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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

FRANK MCCOY, EDWARD ERDELATZ and PIERRE MERLE,
Petitioners,

VS.

THE HEARST CORPORATION, A California Corporation,
SAN FRANCISCO EXAMINER, RAUL RAMIREZ
and LOWELL BERGMAN,
Respondents.

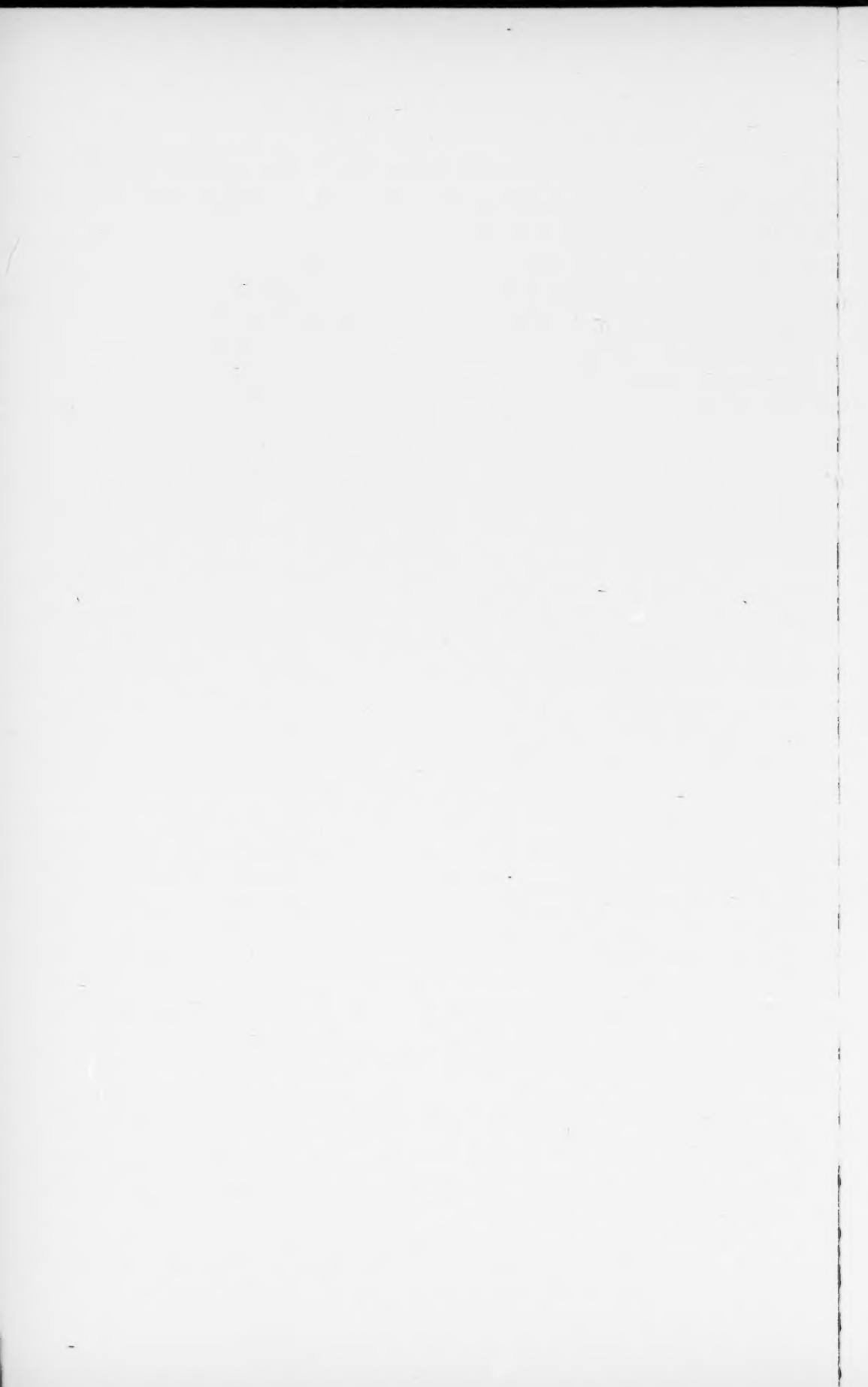
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

In determining whether a record establishes actual malice with convincing clarity under *Bose Corporation v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), may an appellate court disregard reasonable findings and credibility determinations made by a jury.

LIST OF PARTIES**RULE 28.1**

The parties to the proceedings below were the petitioners Frank McCoy, Edward Erdelatz and Pierre Merle and the respondents The Hearst Corporation, a California corporation, San Francisco Examiner, Raul Ramirez and Lowell Bergman.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The petitioners Frank McCoy, Edward Erdelatz and Pierre Merle respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California, entered in the above-entitled proceeding on November 13, 1986.

OPINIONS BELOW

The opinion of the California Supreme Court, dated November 13, 1986, is reported at 42 Cal.3d 835, 231 Cal.Rptr. 518, 727 P.2d 711, and appears in Appendix A hereto. The vacated opinion of the California Court of Appeal, dated October 23, 1985, is reported at 174 Cal.App.3d 892, 220 Cal.Rptr. 848, and appears in Appendix B.

JURISDICTION

The decision of the California Supreme Court was rendered on November 13, 1986. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV:

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 19, 20 and 21, 1976, the *San Francisco Examiner* published a series of articles written by Raul Ramirez with the assistance of Lowell Bergman. The articles dealt with the prosecution and conviction of Richard Lee for the 1972 murder of Poole Leong, which was the product of serious youth gang violence in San Francisco's Chinatown. Petitioners Erdelatz and McCoy were the homicide inspectors assigned to the case, and petitioner Merle was the assistant district attorney responsible for the trial.

The articles charged that the three petitioners obtained Lee's conviction by threatening and intimidating witnesses, fabricating evidence and suborning the perjury of a key witness in the case—Thomas Porter. The articles also stated—erroneously—that Merle had been disciplined by the state bar in connection with another matter. The gist of the series is conveyed by the headline and opening paragraphs of the first article:

"HOW LIES SENT YOUTH TO PRISON FOR MURDER: CURIOUS CONVICTION IN A CHINATOWN TRIAL

"On Nov. 1, 1972, Richard W. Lee, 19, was convicted of first degree murder in what San Francisco authorities hailed as a major breakthrough in their attack on Chinese youth gangs.

"Now, 3½ years later, an *Examiner* investigation has uncovered evidence that he was convicted on the basis of perjured and misleading testimony exacted by a prosecution that badly needed a conviction." (App. A at A-44).

At trial, Ramirez acknowledged the obvious: It was his intention to convey to the reading public that Richard Lee had been "framed" by the police. (R.T. 1620:7-17)¹

The articles were false. The defendants neither offered evidence that the articles were true nor contested the falsity of the defamatory allegations in them. In contrast, all three petitioners and Porter testified that there were no threats, no beatings and no attempts to create or fabricate testimony. (R.T. 640:16-20, 976:15-20; 982:17-25; 984:10-15; 3173:19-3179:6; 3455:27-3456:25). Their testimony was corroborated by a 1972 Christmas greeting Porter sent to the petitioners, the tone of which belied any prospect that the petitioners had forced him to commit perjury by threats and beatings. (Exhibit 84).

The central premise of the articles was that Porter's testimony at Richard Lee's trial was false. Porter, a convicted felon, shared a cell with Lee when they were awaiting their separate, unrelated trials. At Lee's trial, Porter testified that while they were

¹ R.T. refers to the Reporter's Transcript of the trial.

cellmates, Lee confessed that he had committed the Leong murder.

About two years after the trial, and after all direct appeals had affirmed the conviction, Richard Lee's brother—William Lee—approached Bergman, a free-lance writer, to enlist his aid with respect to Richard Lee's case. Bergman became interested and contacted Porter, who was incarcerated in a federal prison in Indiana at the time. Porter was also then under a California detainer, which obligated him to return to California upon completion of his sentence in Indiana. Porter was very concerned about this detainer. Thus, when Bergman wrote Porter advising him not only that he was "journalist and researcher investigating the murder trial of Richard Lee," but also "In addition, I am interested in your own history and present status," (Exhibit H-2) Porter agreed to meet with Bergman.

During this meeting in January 1975, lasting three hours, Bergman prodded Porter into agreeing to produce an affidavit that would "help spring Richard Lee," in exchange for which Bergman would help Porter with the California detainer. (R.T. 1377:23-1379:3). There was more than ample basis for the jury to conclude that Bergman knew that such an affidavit would be false. Porter testified that he told Bergman that his testimony at Lee's trial was truthful, and that when Bergman first asked him if the police had threatened him he told Bergman that they had not. Bergman indicated that such testimony was not what he was looking for, and that Bergman needed a different sort of statement from Porter if he were to assist Porter in getting the detainer removed. Bergman made suggestions as to the type of statements that would be helpful, noting for example, that the San Francisco police had been known to pressure people, to get false statements from them and to threaten their lives. (R.T. 1377:23-1379:22). Bergman's notes of the meeting contained the statement that Porter "understood that actions are what count and until then I and others could promise little help." (Exhibit 56).

In April 1975, Bergman persuaded the *Examiner* to publish a story about the Lee case. The *Examiner's* commitment to publish the story was evidenced by a letter written by Bergman to the Fund for Investigative Journalism in Washington, D.C., in which

Bergman sought a grant and advised the Fund that the *Examiner* had guaranteed the publication of an article or articles on Chinatown which would begin with an indepth re-examination of the Richard Lee case. (Exhibit 80). Raul Ramirez, an *Examiner* staff reporter, was assigned by the publisher Randolph Hearst to work with Bergman on the preparation of the article, although Bergman was to have responsibility for obtaining Porter's version of the facts.

Bergman kept in contact with Porter, and wrote letters which Porter retained. The letters advised Porter that Bergman had a contact "[r]ight smack in the middle of the Governor's office" (Exhibit 27) who could assist in removing the detainer, but indicated that Bergman would not help Porter unless he produced the affidavit that they had discussed. (Exhibit 28). Following one of these letters, Porter signed an affidavit prepared by an Indiana attorney, John Manning, who had been enlisted by Bergman and William Lee for that purpose. In the affidavit, Porter stated, among other things, the following:

1. He gave false testimony in Lee's trial because his life had been threatened by police officers.

2. He was forced to meet repeatedly—perhaps 30 times—with Pierre Merle of the District Attorneys office.

3. Merle gave him a written story when they first met and told him to learn it so he could give it as testimony against Lee. Merle had him recite it over and over and told him how he should testify. Merle always took the written story back at the end of the meeting.

4. When he refused to go along with the story, McCoy and his partner took him into an elevator and the partner drew a revolver and said Porter would testify for the prosecution or his people would never see him again. It was election time and they needed a conviction. McCoy's partner then hit him behind and below the ear, causing it to swell but leaving no mark. At the same time, the partner kicked him in the tail which had a cyst on it, causing it to swell and bleed; and afterwards he could barely walk for two to three days. He was treated for the kick at the county jail hospital.

5. McCoy promised him enough money to make bond for his girlfriend, which he believed was \$35,000.00. (Exhibit 61).

Manning had serious doubts about the truth of Porter's affidavit. At the libel trial, Manning testified: "My opinion and my opinion now is that Porter would say or do anything to improve his position behind bars." He was then asked whether he conveyed his doubts about Porter's affidavit to Bergman. His reply: "Yes." (R.T. 1569:26-1571:6).

After signing the affidavit, Porter received a letter from the Office of the Governor of California advising him that his detainer had been lifted and he was not required to return to California. (R.T. 2670:26-2671:27; Exhibit 31).

Respondents were well aware of the need to verify the allegations in Porter's affidavit. Ramirez had been advised by one of his colleagues at the *Examiner* and by Richard Lee's attorney that Erdelatz and McCoy were highly regarded and considered good police officers. (R.T. 1723:12-28). Both Ramirez and the city editor—William Burkhardt—knew the patently obvious: Publication of the articles would seriously damage petitioners' reputations. (R.T. 1723:28-1724:13; 3869:23-26). Indeed, recognizing their libelous nature, Burkhardt sent the articles to the managing editor and the Examiner's attorneys for review and comment prior to publication. (R.T. 3869:27-3870:26). Whether this review took place, and what, if anything, resulted from it remains unclear since no testimony was presented in this regard.

Although respondents had Porter's affidavit for nearly a year before the articles were published, they were unable to confirm the libelous charges from any other source. (R.T. 1693:12-22). They could not contact any of the three people whom Porter allegedly said he told about petitioners' alleged misconduct.² They

² Porter allegedly claimed that he told his father, his sister and a jail chaplain about petitioners' supposed misconduct. His father was dead; the existence of the chaplain could not be verified (R.T. 1675:9-19); and on the one occasion when the respondents contacted Porter's sister, she would not talk to them.

could not locate records to verify his claim that his beatings required treatment in the county jail hospital. (R.T. 1711:6-21). They could not confirm that Porter met with Merle some 30 times. (R.T. 1694:2-10). Indeed, to the contrary, jail records established that Porter was taken out of his cell only three times.³

Nevertheless, relying on Porter's affidavit, respondents published the libelous articles. All three petitioners served demands for retraction upon the publisher. (Exhibits 72, 73 and 74). Even after receiving these demands, neither the paper nor the editor/publisher directed any investigation into the truth or falsity of the articles. Instead, the paper published an editorial designed to influence the outcome of a habeas corpus petition filed by Lee after the publication of the articles and premised on Porter's affidavit. (R.T. 2403:12-24). The paper did print a correction on June 15, 1976 as to statements in the articles charging that Merle was disciplined by the state bar. (Exhibit 69).

At trial, despite their lack of access to the media and the generally non-policy making nature of their responsibilities, the petitioners did not contest their status as "public officials." Consequently, the jury was instructed that petitioners could not prevail unless they demonstrated by clear and convincing evidence that the libelous articles were published by defendants with knowledge of their falsity or with a reckless disregard of their truth or falsity. (R.T. 4709:17-21; 4710:9-17). The jury returned a verdict in favor of the petitioners. Each petitioner was awarded \$500,000.00 compensatory damages and \$500,000.00 punitive damages against the *Examiner*, and \$250,000.00 compensatory

³ Ramirez admitted that he did not believe Porter met with Merle, Erdelatz and McCoy 30 times. (R.T. 1701:19-22). However, he testified that he could not check the jail records because Lieutenant Huegle of the County Jail told him that the records were a "mess." (R.T. 1703:4-5). Yet Lieutenant Huegle, who retired from the Sheriff's office after 29 years of service of which 28 were spent working in jails, testified that all removals from the cells were recorded in large, hard-bound books with the date, time, inmate's name and the removing officer's name and department. He had no recollection whatsoever of talking to Ramirez about a prisoner being moved, and never told anyone that such records were a mess. (R.T. 2929:1-2932:27).

and \$10,000.00 punitive damages against Bergman and Ramirez each. Motions for a new trial and judgment notwithstanding the verdict were denied. While pending on appeal, this Court issued its decision in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). All parties briefed the question of *Bose's* applicability to this case. The Court of Appeals concluded that *Bose* imposed the following obligation on an appellate court reviewing a finding of actual malice (App. B at B-5):

“Our function on review is to ‘examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff’s favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice.’ ”

Applying this standard, the Court of Appeals found the case to be a “textbook case of libel,” App. B at B-38, and affirmed the judgment.

The Supreme Court of California granted a petition for review. It rejected the Court of Appeals view that *Bose* did not abrogate the basic principle that on appellate review, where equally plausible inferences may be drawn, the evidence is to be viewed in the light most favorable to the prevailing party. Instead, the California Supreme Court held (App. A at A-9):

“This court is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents.”

Applying this principle, the California Supreme Court reversed the judgment for petitioners.

The thrust of its opinion is that the respondents could have believed the allegations in Porter’s affidavit because the other evidence against Richard Lee was weak. There was ample evidence that respondents purposely ignored available information that would have confirmed that Richard Lee was guilty of

murdering Poole Leong.⁴ Yet, even more importantly, as the jury undoubtedly recognized, there is a quantum leap from the conclusion that the state's case against Richard Lee was not overwhelming to the assertion that the assistant district attorney and police inspectors responsible for the case suborned perjury of a critical witness through threats, beatings and bribery in order to obtain the murder conviction of an innocent person. A more damning accusation against law enforcement professionals is difficult to imagine.⁵

⁴ One example was that shortly after Leong was killed and prior to Lee's arrest, Lee conferred with a highly respected criminal lawyer to discuss his case. This attorney did not represent Lee at trial. However, respondents discovered that the conference had occurred and contacted the attorney, who had by then become a judge, for information. The judge advised them that the attorney-client privilege prevented him from discussing the conference with them, but that he would do so if they obtained a waiver from Lee. However, he also advised them that what he knew would not be helpful to Lee. Respondents then asked Lee if he would waive the privilege. Lee agreed, but advised respondents that he never discussed Leong's murder with the attorney. Respondents accepted Lee's story and never contacted the attorney again to determine what information he had. (R.T. 1730:15-1734:19).

⁵ The *Examiner's* erroneous reporting on the Lee case did not end with the publication of the libelous series of articles. On August 6, 1976, Ramirez wrote an article about the fact that Porter had changed his story and denied the allegations in the affidavit upon which the series was based. That article stated:

"[M]anning said he visited Porter shortly after the *Examiner's* stories were published last May and that he showed him copies of the articles. He read them and he showed great interest but he gave no indication he would shift his stance, he said." (Exhibit 52).

However, Manning testified that he never saw Porter after April 10, 1975—more than a year before the articles were published. Manning testified that he never saw the articles, let alone showed them to Porter. (R.T. 4184:26-4188:4). The *Examiner's* assertions that Manning did show the articles to Porter and that Porter reacted to them were obviously false.

REASONS FOR GRANTING THE WRIT

I

THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THE SECOND AND NINTH CIRCUITS AND WITH DECISIONS OF THE HIGHEST STATE COURTS IN ARIZONA, MASSACHUSETTS AND VIRGINIA

In *Bose*, this Court was called upon to decide "which [of] two well-settled and respected rules" governed appellate review of a federal district court's libel judgment in favor of a plaintiff: The "clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure" or "the rule of independent review applied in *New York Times Co. v. Sullivan*." 466 U.S. at 498, 499. The Court held that the latter rule was applicable.

Bose did not purport to change the nature of appellate review required under the *New York Times* rule. The Ninth Circuit has held that under the *New York Times* rule of review, an appellate court must view the evidence in the light most favorable to the prevailing party. *Guam Federation of Teachers v. Ysrael*, 492 F.2d 438, 441 (CA9 1974), cert. denied, 419 U.S. 872 (1974).⁶ As it explained in *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 780 (CA9 1975), cert. denied, 423 U.S. 930 (1975), a decision relied upon by the Court of Appeals in this case:

"[A]n appellate court on review must examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice. Once this question has been resolved in the plaintiff's favor, the jury's findings as to those inferences and as to witness credibility are determinative."

⁶ In doing so, the Ninth Circuit rejected the view advanced by Judge Wright in *Wasserman v. Time, Inc.*, 424 F.2d 920, 922-23 (C.A.D.C. 1970), cert. denied, 398 U.S. 940 (1970), that an appellate court was free to judge the credibility of witnesses and draw its own inferences from the evidence.

Post-*Bose*, at least three state supreme courts have agreed with this position and have held that in reviewing a judgment requiring proof of "actual malice" under *New York Times*, an appellate court must view the facts most favorably to a prevailing plaintiff. *Dale K. Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562, 574 (Ariz. 1986); *Tosti v. Ayik*, 394 Mass. 482, 476 N.E.2d 928, 935 (Mass. 1985); *Gazette v. Harris*, 229 Va. 1, 325 S.E.2d 713, 727-28 (Va. 1985). In addition, the Second Circuit has concluded that *Bose* "does not permit us to substitute our views for legitimate jury findings." *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 140 (CA2, 1984).

Indeed, the California Supreme Court cited only one authority to support its contrary view that it was "not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents." App. A at A-9. That was Judge Wright's dissenting opinion in *Tavoulareas v. Piro*, 759 F.2d 90, 147 (C.A.D.C. 1985). The D.C. Circuit granted rehearing *en banc* in *Tavoulareas*, 763 F.2d 1472, 1481 (C.A.D.C. 1985), and the case is still pending.⁷

There is little doubt that had the California Supreme Court interpreted its appellate review obligations under *Bose* and *New York Times* consistently with the views of the Ninth and Second Circuits and the Supreme Courts of Arizona, Massachusetts and Virginia, the judgment for petitioners should have been affirmed.

First, there was ample evidence from which a jury could conclude by clear and convincing evidence that the libelous allegations against petitioners were published with knowledge of their falsity. The sole basis of the allegations was a false affidavit solicited by one of the reporters—Bergman—responsible for the

⁷ The California Supreme Court's decision is consistent with the expressed view of Chief Justice Bird that the minority view of Justices Goldberg and Douglas in *New York Times v. Sullivan*, 376 U.S. 254 (1964), should prevail, and that as to a public official, the press should be "free to be foolish" . . . "free to be destructive" . . . "free to be unfair." (*Fellows v. National Enquirer, Inc.*, 42 Cal.3d 234, 228 Cal.Rptr. 215 (1986)).

articles. The existence of a "deal" between Bergman and Porter was supported not only by Porter's testimony (R.T. 1378:8-23), but also by documentary evidence in the form of letters written from Bergman to Porter. (Exhibits 27 and 28). Although Bergman took the stand and denied that he knew the affidavit was false, the jury obviously disbelieved him. There was certainly an adequate basis for their doing so. For example, Bergman testified that he believed that the articles did not hurt the petitioners. (R.T. 2699:11-16). As the Court of Appeals found, App. B at B-7 n.4, this testimony is extraordinary. On this basis alone, the jury could have justifiably doubted whatever else Bergman said. Bergman's credibility was also undermined by his testimony that in every phone conversation he had with Porter, Porter's major concern was "retribution by law enforcement" if he should have to return to California. (R.T. 2822:5-11). Yet in his pre-trial answers to questions posed through written interrogatories and during deposition, in which Bergman identified and described every phone call with Porter, there was no mention of any concern about "law enforcement retribution." To the contrary, Bergman testified Porter was concerned because he might be killed for being a "snitch." (R.T. 2856:22-2867:8; 2871:17-2878:2).

Second, there was more than abundant evidence of convincing clarity from which the jury could have concluded that the articles were published with reckless disregard of their falsity. Although respondents had Porter's affidavit for over a year before publishing the libelous articles, they were unable to confirm any of the libelous allegations in it. They were admittedly aware of the need to do so. The *Examiner's* Editor/Publisher testified that it was not the policy of the paper to publish an affidavit of a convict who admitted he had lied under oath without getting independent support of the charges (R.T. 2433: 13-2434), and that if a reporter were unsure of the veracity of a source, the reporter was obligated to check the statement. (R.T. 2470: 13-20). The City Editor agreed that it was necessary to substantiate the charges. (R.T. 3884: 24-28). Bergman acknowledged that it was important to find somebody that would corroborate whether Porter was telling the truth. (R.T. 2616: 3-6). Ramirez admitted that he did not believe portions of Porter's affidavit, including the charges that Porter met with Merle some 30 times (R.T. 1701: 19-27).

and that McCoy had promised Porter "enough money to make Sybil Kenney's [Porter's girlfriend] bond of \$35,000.00. (R.T. 1716:23-1717:2). Ramirez also acknowledged that he was never able to confirm the charges of brutality and threats. (R.T. 1693:19-22). Nevertheless, despite the absence of evidence corroborating Porter's libelous allegations, the *Examiner* published the series.

The Arizona Supreme Court has recently described the controversy concerning the scope of appellate review under *Bose* and *New York Times*:

"The proper scope of review expected of appellate courts under *Bose* is currently the subject of hot debate. The United States Court of Appeals for the District of Columbia Circuit gave the matter extensive consideration in *Tavoulareas v. Piro* [citations omitted]. A final decision in *Tavoulareas* is now pending. While we do not rely on *Tavoulareas* as precedent, there is much in the majority opinion that we find persuasive.

The question that is so perplexing is how an appellate court should treat decisions that rest upon an assessment of the credibility of witnesses, particularly where the versions of what occurred are in direct conflict. Should an appellate court defer to the finder of fact's assessment of the underlying facts, or should it undertake a *de novo* evaluation of the entire case, in the process, making its own determination as to who was lying and who was telling the truth."

Starkins v. Bateman, 724 P.2d 1206, 1211 (Ariz. 1986).

This Court should grant certiorari to clarify the nature of appellate review under *Bose* and to resolve the conflict concerning it.

II

THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S OPINION LAST TERM IN *ANDERSON V. LIBERTY LOBBY, INC.*

In last term's decision in *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), this Court held that in ruling on a summary

judgment motion in a case governed by the *New York Times* clear and convincing standard, a district court must take into account the higher evidentiary burden imposed on a plaintiff. In reaching this conclusion, the Court recognized that the standard for summary judgment—"whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party"—"mirrors the standard for a directed verdict." 106 S.Ct. at 2511. For "[i]f reasonable minds could differ as to the import of the evidence . . . a verdict should not be directed." *Id.*

The Court then cautioned that even though the plaintiff's heightened evidentiary burden must be taken into account in ruling on motions for summary judgment or a directed verdict in cases governed by the *New York Times* standard,

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 106 S.Ct. at 2513.

The California Supreme Court's decision is in direct conflict with this principle. It simply makes no sense to require a trial court to give a libel case to the jury if the jury could find for the plaintiff by drawing justifiable inferences or making credibility determinations in the plaintiff's favor, and then hold that the Constitution enables an appellate court, solely upon a cold record, to reverse the judgment by rejecting those very inferences and credibility determinations once the jury has actually made them. Surely an appellate court's latitude to determine the sufficiency of a plaintiff's libel case once the jury has decided in plaintiff's favor cannot exceed the latitude given a trial court prior to the submission of the case to the jury.

In short, in order to ensure symmetry between the standard employed by trial courts and the standard used by appellate courts to determine the sufficiency of a libel case, appellate courts engaged in a *Bose* review must draw all justifiable inferences in

favor of a prevailing plaintiff, just as *Anderson* required trial courts to do in deciding motions for summary judgment or a directed verdict.

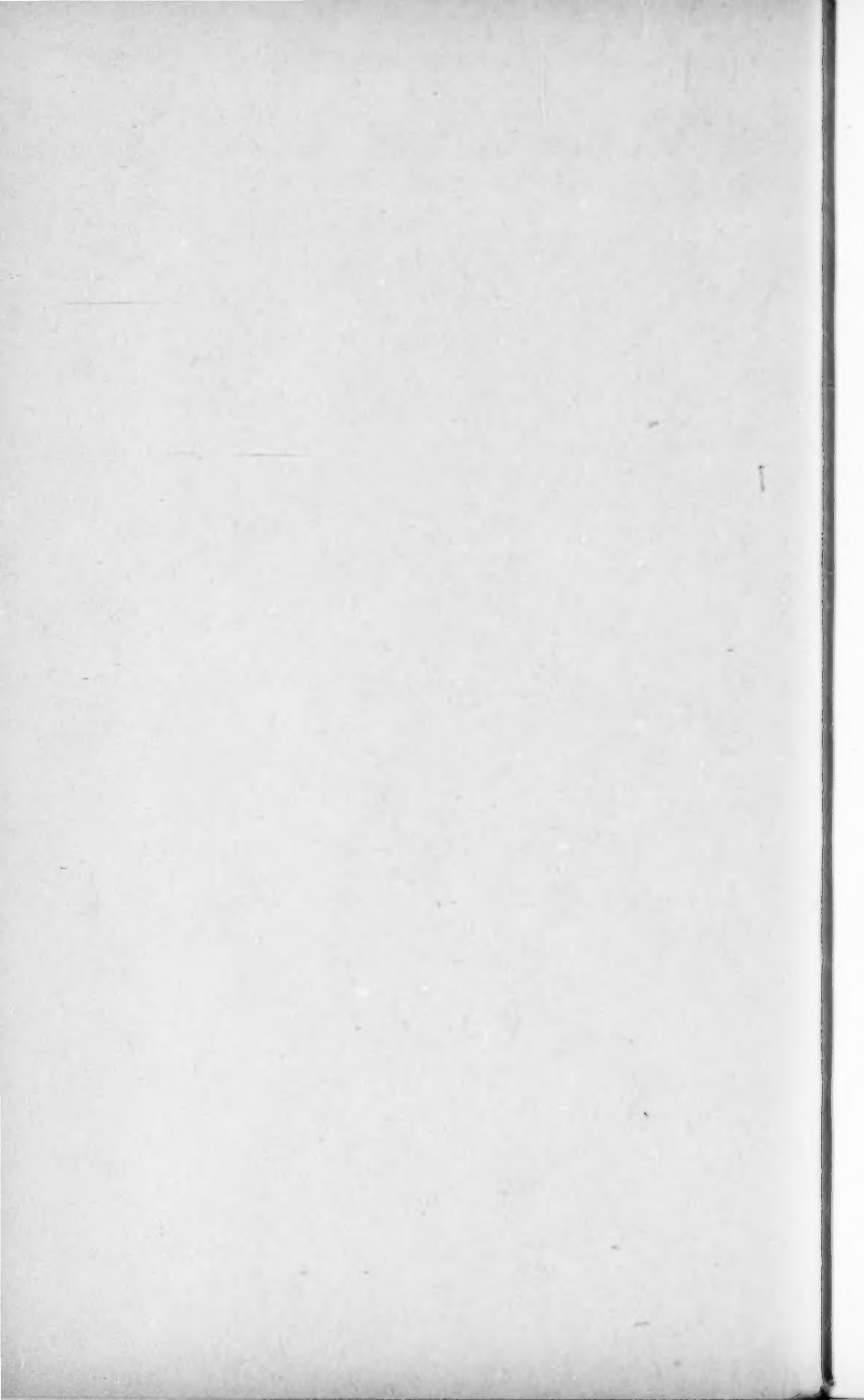
CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the California Supreme Court.

Respectfully submitted,

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Of Counsel



Appendix A

[S.F. No. 24967, Nov. 13, 1986.]

Frank McCoy et al.,
Plaintiffs and Respondents,
v.
Hearst Corporation et al.,
Defendants and Appellants.

Opinion

BIRD, C. J.—Do the First Amendment to the United States Constitution and California Constitution article I, section 2, protect two reporters and a newspaper against a libel judgment when they obtained and published a prisoner's affidavit containing allegations of official misconduct on the part of two police inspectors and a prosecutor?

I.

A suit for libel was brought against the Hearst Corporation, which owns the San Francisco Examiner (hereafter Examiner), and two reporters, Raul Ramirez and Lowell Bergman, by respondents, San Francisco Police Inspectors Frank McCoy and Edward Erdelatz, Jr., and former Assistant District Attorney Pierre Merle. The jury returned a verdict in favor of respondents in the sum of \$4,560,000. The Court of Appeal affirmed the judgment.

Respondents complained they were libeled by a series of articles published in the Examiner on May 19, 20 and 21, 1976, written by Raul Ramirez with the assistance of Lowell Bergman. The articles purported to expose the wrongful conviction of Richard Lee for the 1972 San Francisco Chinatown killing of Poole Leong. According to the Examiner, Lee's conviction was obtained as a result of respondents' misconduct involving the state's key witness, Thomas Porter.¹

The centerpiece of the articles, and the basis of respondents' libel claim, was the affidavit of Thomas Porter. This affidavit was reprinted in part in the last article and mentioned in the two

¹ The articles are appended hereto as Appendices A through C.

previous articles. Porter, Richard Lee's cellmate prior to trial, originally testified at Lee's trial that Lee had confessed the Leong killing to him. However, the Examiner reported that Porter had not only declared this testimony false in a sworn affidavit, but also had charged that respondents procured his trial testimony by threats, coercion, physical assault and promises of leniency. Porter additionally alleged that respondent Merle, who prosecuted the Lee case, provided him with a written story which he memorized with Merle's help and delivered as testimony at the Lee trial.

The article of May 21st also claimed that a State Bar panel had recommended sanctions be taken against respondent Merle for "alleged misconduct" in relation to another Chinatown case.

Shortly after the articles appeared, Attorney Roger Ruffin filed a petition for writ of habeas corpus in superior court on behalf of Richard Lee. The petition alleged that Lee was innocent and that his conviction was based on false and unreliable evidence. Porter's affidavit² was attached as an exhibit in support of the petition, along with declarations from two eyewitnesses to the Leong killing, May Tom and Weyman Tso.

In response to the habeas corpus petition, investigators from the Attorney General's office located Porter in a halfway house in Wichita, Kansas, and obtained a second affidavit from him on July 22, 1976. In this affidavit, Porter attested that his previous affidavit was false. He signed it, he said, because he was upset at the treatment he had received from the California parole board. Porter denied he had been threatened or forced by anyone to give testimony at the Lee trial, or that any promises had been made to him in exchange for that testimony.

II.

In the landmark decision of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412], the Supreme Court held that a public official may not recover damages for a defamatory falsehood relating to official

² The full text of Porter's affidavit is appended hereto as Appendix D.

conduct unless it is proved "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (*Id.*, at pp. 279-280 [11 L.Ed.2d at p. 706].)³ The high court further declared that in order to ensure that the libel judgment does not run afoul of constitutional principles, it must *independently examine* the statements in issue and the circumstances under which they were made against the backdrop of the whole record. (*Id.*, at p. 285 [11 L.Ed.2d at p. 709].)

Recently, in *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485 [80 L.Ed.2d 502, 104 S.Ct. 1949], the court strongly reaffirmed the principle of independent review. "The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection *is not merely a question for the trier of fact*. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" (*Id.*, at pp. 510-511 [80 L.Ed.2d at p. 523], italics added.)

Bose makes plain that in cases involving the constitutional rule of *New York Times*, those facts that are germane to the central question of actual malice must be sorted out and reviewed de novo, independently of any previous determinations by the trier of

³ Respondents concede they are public officials within the *New York Times* rule. (See *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 932-934 [186 Cal.Rptr. 605] [police officers are "public officials"]; *Rosenblatt v. Baer* (1966) 383 U.S. 75, 85 [15 L.Ed.2d 597, 605, 86 S.Ct. 669] ["... 'public official' designation applies at the very least to those ... government employees who have ... substantial responsibility for or control over the conduct of governmental affairs. (Fn. omitted.)"].)

fact. (*Bose, supra*, 466 U.S. at pp. 505-514 [80 L.Ed.2d at pp. 519-526].) “The simple fact is that First Amendment questions of “constitutional fact” compel this Court’s *de novo* review. [Citations.]” (*Id.*, at p. 509, fn. 27 [80 L.Ed.2d at p. 522], quoting *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, 54 [29 L.Ed.2d 296, 318, 91 S.Ct. 1811] (plur. opn. of Brennan, J.); accord *Frankson v. Design Space Intern.* (Minn.App. 1986) 380 N.W.2d 560, 570 (conc. opn. of Foley, J.) [*Bose* gives appellate court power to conduct *de novo* review]; *Thompson v. Thompson* (1986) 110 Idaho 93 [714 P.2d 62, 64] [citing *Bose* for the proposition that constitutionally protected interests such as freedom of speech require appellate courts to conduct “free review” of constitutional facts].) Thus, this court must make an independent assessment of the entire record, but only as it pertains to actual malice. Issues apart from this constitutional question need not be reviewed *de novo* and are subject to the usual rules of appellate review. (*Bose, supra*, 466 U.S. at p. 514, fn. 31 [80 L.Ed.2d at p. 526].)

Bose involved an allegedly libelous article in Consumer Reports critiquing the sound path of the Bose 901 loudspeaker system. The article asserted that the sound tended to wander “about the room.” (*Bose, supra*, 466 U.S. at pp. 487-488 [80 L.Ed.2d at p. 509].) The federal district court as trier of fact found that this phrase was a false and disparaging statement of fact since the listeners in the sound test, which was the basis of the article, reported instead that there was sound movement “along the wall” between the two speakers. (*Id.*, at pp. 490-491, 494 [80 L.Ed. 2d at pp. 510, 513].)

Engineer Arnold Seligson, a Consumers Union employee, supervised the listeners’ sound test and interpreted its results in an in-house report. The district court found Seligson’s report to be the source of actual malice. In its written findings, the court evaluated Seligson’s credibility as a witness and his state of mind when he wrote the report. It concluded that Seligson had knowingly reported a false statement about the speakers’ sound movement, and therefore, wrote with actual malice. In making this determination, the district court flatly rejected Seligson’s testimony that the two phrases “about the room” and “along the wall”

meant about the same thing and expressly found that Seligson's testimony to this effect was not credible. (*Bose, supra*, 466 U.S. at 494-497 [80 L.Ed.2d at pp. 512-514].)

The court of appeals reversed on the ground that the record could not sustain a finding of actual malice. The court ruled that it must review the actual malice determination *de novo* and that it was not restricted by the "clearly erroneous," standard of rule 52(a) of the Federal Rules of Civil Procedure (hereafter rule 52(a)). (See *Bose supra*, 466 U.S. at pp. 491-492 [80 L.Ed.2d at pp. 510-511].) That rule mandates that factual findings shall not be set aside unless "clearly erroneous," and that due regard be given to the opportunity of the trial court to evaluate witness credibility.

The case presented the Supreme Court with an apparent conflict between the *New York Times* rule of independent appellate review and rule 52(a). (*Bose, supra*, 466 U.S. at pp. 498-499 [80 L.Ed.2d at p. 515].) The *Bose* court observed that in *New York Times*, in the parallel context of review of state jury verdicts, it had rejected a similar contention by the plaintiff there that the Seventh Amendment⁴ precluded independent review of a state jury verdict. (*Id.*, at pp. 508-509, fn. 27 [80 L.Ed.2d at p. 522].)

"Recognizing that the Seventh Amendment's ban on reexamination of facts tried by a jury applied to a case coming from the state courts [citations], we found the argument without merit . . . [;] review of findings of fact is appropriate 'where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" (*Ibid.*)

The high court held that notwithstanding rule 52(a), such a *de novo* review of "constitutional facts," i.e., facts underlying the finding of actual malice, was necessary to cases arising from bench trials in district court as well. (*Bose, supra*, 466 U.S. at pp.

⁴ The Seventh Amendment to the United States Constitution states in part that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

498-499, 510-511, 514 [80 L.Ed.2d at pp. 515, 523, 525-526].) In so doing, it reiterated the holding of *New York Times* that reviewing courts are obligated to test the actual malice determination against the guaranties of the First and Fourteenth Amendments by making "an independent constitutional judgment on the facts of the case." (*Id.*, at pp. 508-509, fn. 27 [80 L.Ed.2d at p. 522]; *New York Times*, *supra*, 376 U.S. at p. 285 [11 L.Ed.2d at p. 709].)⁵

The court stressed that there are some issues which, even though largely factual in nature, entail stakes of such constitutional magnitude that they may not be entrusted "finally to the judgment of the trier of fact." (*Id.*, at p. 501, fn. 17 [80 L.Ed.2d at p. 517]; see also pp. 504-510 [80 L.Ed.2d at pp. 518-523] [discussing other types of First Amendment cases in which the factfinder's interpretation of the evidence is subject to independent appellate reevaluation].)⁶

⁵ *Bose* rejected any suggestion that the duty of independent review is affected by the length or complexity of the trial, or the amount of oral testimony versus documentary evidence adduced. (466 U.S. at pp. 500-501 [80 L.Ed.2d at p. 516].)

⁶ Despite their differences with the majority over the role of rule 52(a)'s clearly erroneous standard, the dissenting justices in *Bose* themselves distinguished the federal bench verdict from the state court jury verdict. Cases which come to the reviewing court from a state court after a jury trial "present[] the strongest case for independent factfinding" by the appellate courts. (*Bose*, *supra*, 466 U.S. at p. 518, fn. 2 [80 L.Ed.2d at p. 528] (dis. opn. of Rehnquist, J.).)

Justice Rehnquist's dissenting opinion in *Bose* observed that it is much easier to justify independent review of jury-found facts due to the inherent vagueness of a general jury verdict and the extremely narrow latitude allowed appellate courts at common law to review such verdicts. (*Ibid.*)

In a similar vein, this court agrees with amici curiae, American Society of Newspaper Editors and American Newspaper Publishers Association, that *Bose* supports the proposition that the de novo rule of review applies with special force to jury verdicts. There is a greater danger that the jury will ignore the limits of the First Amendment, find for the plaintiff out of sympathy, or find against the defendant out of hostility to speech that ought to be protected. (See *Ollman v. Evans*

Indeed, in *Bose* the court specifically *rejected* the inferences drawn by the district court regarding Seligson's testimony on the issue of actual malice including the finding that his testimony on this issue was not credible. According to *Bose*, rather than realizing his statement was inaccurate at the time he wrote it, Seligson suffered simply from a "misconception" that "about the room" was the same as "along the wall." (*Bose, supra*, 466 U.S. at pp. 512-513 [80 L.Ed.2d at pp. 524-525].)

The district court's conclusion that Seligson's testimony, "I know what I heard," indicated that he must have realized the statement was false when he wrote it was deemed inappropriate. "'Analysis of this kind may be adequate when the alleged libel purports to be an . . . account of events that speak for themselves.' [Citations.] Here, however, adoption of the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities'" (*Bose, supra*, 466 U.S. at p.512 [80 L.Ed.2d at pp. 524-525], italics in original.)

The high court also noted the existence of the normal rule that testimony disbelieved by the trier of fact "is not considered a sufficient basis for drawing a contrary conclusion." (*Bose, supra*, 466 U.S. at p. 512 [80 L.Ed.2d at p. 524].) However, it went on to suspend application of this rule to the actual malice context by salvaging Seligson's discredited testimony from the heap of disbelief and reinterpreting its constitutional import.

"In this case the trial judge found it impossible to believe that Seligson continued to maintain that the word 'about' meant 'across.' Seligson's testimony [however] does not constitute clear and convincing evidence of actual malice. Seligson displayed a capacity for rationalization. He had made a mistake and when confronted with it he refused to admit it and steadfastly at-

(D.C. Cir. 1984) 750 F.2d 970, 1006 (conc. opn. of Bork, J.), cert. den. (1985) — U.S. — [86 L.Ed.2d 278, 105 S.Ct. 2662]; see *Bose, supra*, 466 U.S. at p. 518, fn. 2 [80 L.Ed.2d at p. 528] (dis. opn. by Rehnquist, J.).) "[T]he Supreme Court has told us (most recently in [*Bose*]) to be assiduous in protecting the press, even in its least worthy manifestations, from the fury of outraged juries." (*Douglass v. Hustler Magazine, Inc.* (7th Cir. 1985) 769 F.2d 1128, 1142.)

tempted to maintain that no mistake had been made—that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of the publication.” (*Ibid.*)

Both the principles announced in *Bose* and the manner in which the high court carried out its function of independent review, are the guide to be followed in reviewing the evidence at hand.

First, this court must independently review all the evidence presented on the issue of actual malice. It may not restrict itself, as the Court of Appeal did, to evidence favorable to the judgment. By its repeated emphasis that a *New York Times* review includes the *whole* record on actual malice, the high court has made it unmistakably clear that it is constitutionally inadequate to review only those portions of the record that support the verdict. (See *Bose, supra*, 466 U.S. at pp. 508-509 and fn. 27 [80 L.Ed.2d at pp. 521-523]; *Letter Carriers v. Austin* (1974) 418 U.S. 264, 282 [41 L.Ed.2d 745, 760-761, 94 S.Ct. 2770]; *Beckley Newspapers v. Hanks* (1967) 389 U.S. 81, 82 [19 L.Ed.2d 248, 250, 88 S.Ct. 197]; *New York Times Co. v. Sullivan, supra*, 376 U.S. at p. 285 [11 L.Ed.2d at p. 709].)

Additionally, our independent assessment may in some cases involve review of evidence which, like Seligson’s testimony in *Bose*,⁷ would be considered “discredited” under usual rules of appellate review of the jury verdict in favor of respondents. (See *Bose, supra*, 466 U.S. at p. 512 [80 L.Ed.2d at 524].)

Second, the execution of this “constitutional responsibility . . . cannot be delegated to the trier of fact” (*Bose, supra*, 466 U.S. at p. 501 [80 L.Ed.2d at p. 516]), and requires this court to step beyond the usual confines of appellate review. Normal principles of substantial evidence review do not apply to the appellate court’s independent review of an actual malice determination in a First Amendment libel case.⁷

⁷ Our court is not subject to the “clearly erroneous” standard of rule 52(a). However, the standard of review that rule prescribes is similar to the doctrine which restricts the power of our appellate courts to a

This court is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents. To do so would compromise the independence of our inquiry. "[T]he constitutional responsibility of independent review encompasses far more than [an] exercise in ritualistic inference granting." (*Tavoulareas v. Piro* (D.C.Cir. 1985) 759 F.2d 90, 147 (dis. opn. of J. Skelly Wright, J.), reh'g. en banc granted, 763 F.2d 1472, 1481.)

Finally, if warranted, this court may do as the *Bose* court did with Seligson's testimony and substitute its own inferences on the issue of actual malice for those drawn by the trier of fact.⁸ This court must independently determine the constitutional import of any particular witness's testimony as it relates to the question of actual malice. (See *Miller v. Fenton* (1985) U.S. [88 L.Ed.2d 405; 106 S.Ct. 445].)⁹

determination whether there is any substantial evidence, contradicted or uncontradicted, which supports the verdict. (See *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183]; 9 Witkin, Cal. Procedure (3d ed. 1985) § 278, pp. 289-291; *Wanless v. Rothballer* (1985) 136 Ill.App.3d 321 [483 N.E.2d 899, 902] [rule 52(a) is similar to usual prohibition in civil cases against disturbing the determination of trier of fact unless it is contrary to the manifest weight of the evidence].)

Moreover, *Bose* in effect represents merely an express extension to bench trials of the longstanding requirement of de novo review established in *New York Times* in the context of state jury verdicts. (See Monaghan, *Constitutional Fact Review* (1985) 85 Colum. L.Rev. 229, 230.) Thus, it is clear that, as in the case of rule 52(a), the substantial evidence rule does not prescribe the standard of review in First Amendment libel cases. To the extent that the substantial evidence doctrine conflicts with the rule of independent review in these cases, it must yield. (See *Franklin v. Leland Stan. Junior University* (1985) 172 Cal.App.3d 322, 330-333 [218 Cal.Rptr. 228].)

⁸ This case is particularly well-suited for independent appellate review since the cornerstone of respondents' libel allegations, Thomas Porter, failed to testify at trial and was presented to the jury solely through the cold record of his deposition testimony.

⁹ The Court of Appeal herein relied upon two pre-*Bose* cases, *Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 433 [142

III.

The crucial focus of actual malice under *New York Times* is the defendant's attitude, or state of mind, toward the allegedly libelous material published. (*St. Amant v. Thompson* (1968) 390 U.S. 727 [20 L.Ed.2d 262, 88 S.Ct. 1323]; *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256-259 [208 Cal.Rptr. 137, 690 P.2d 610].) In order to evaluate whether the evidence on this record is constitutionally adequate to support the judgment, it is necessary to set out at some length the complete factual record underlying the actual malice determination. However, this court is mindful that evidence concerning appellants' investigations and discoveries was not introduced for its truth, but only as it related to the state of mind of the appellants.

Preliminary Investigation by Bergman

In September of 1974, William Lee, Richard Lee's brother, approached Bergman, a freelance investigative journalist, with a request that he look into the fairness of the trial proceedings in Richard Lee's case. William Lee told Bergman that he felt his brother had not received a fair trial. He was concerned that the outcome of the trial might have been influenced by a report distributed and publicized by the California Department of Justice characterizing Chinese youth gangs as the major organized crime threat in the state. He had attended Richard Lee's trial and told Bergman that in his view, it had been tried on the "theory" that Richard Lee was a gangster and that "putting him away" would begin to solve gang problems in Chinatown.

Bergman initially refused William Lee's request to look into the matter, but eventually agreed to read the trial transcript since he was collecting information at the time on organized crime and Chinatown.

Cal.Rptr. 304], and *Bindrim v. Mitchell* (1979) 92 Cal.App.3d 61, 72 [155 Cal.Rptr. 29], for its conclusion that its review of the evidence was not de novo but was circumscribed instead by the substantial evidence rule. To the extent that *Widener* and *Bindrim* suggest that the reviewing court's duty to examine the record in public official defamation cases does not involve a de novo review of the actual malice determination, they are inconsistent with *Bose* and are hereby disapproved.

After his review of the transcript, Bergman concluded that there were several irregularities in Lee's case. For example, Bergman observed that respondent Merle had apparently not disclosed the existence of the key state's witness, Porter, until the time of trial. He found Porter's testimony difficult to believe. Bergman noted that during respondent McCoy's testimony in the Lee case, he identified two men in the courtroom audience as Chinatown gang members. Bergman perceived this procedure as "highly unusual" and designed to suggest to the jury that the men were present in order to intimidate May Tom during her testimony. Bergman also noted that when May Tom, the sole eyewitness at trial, was asked if Richard Lee was the person she saw kill Leong, she replied "I guess so."

Bergman made a general assessment that the trial proceedings "didn't look right"; that there might have been a miscarriage of justice. He decided to proceed with a preliminary investigation, to try to locate witnesses and to obtain additional information. His motivation to pursue the case was grounded in his belief that the alienation minority youths like Richard Lee experienced frequently led to unjust treatment from the law: "the way in which justice was meted out to them did not seem . . . to be fair, that it was necessary in some ways to maybe make some effort to rectify that situation."

Bergman subsequently had several conversations with William Lee, who also provided him with a copy of an affidavit he had obtained from Weyman Tso. Tso declared that he was present at the scene of the Leong killing but that Richard Lee, whom he knew well, was neither present nor involved.¹⁰

Bergman next conducted interviews as part of his preliminary investigation. He spoke with Berkeley City Council member Ying Lee Kelly regarding the relationship between law enforcement and the Asian community in the San Francisco area. She in-

¹⁰ Tso had been identified by May Tom on the night of the homicide as the second youth present at the killing. Although he was arrested and released in March of 1973, Tso was apparently never prosecuted in connection with the Leong incident. As noted, Tso's affidavit was attached as an exhibit to the Lee habeas corpus proceeding.

formed him that it was well known that organized crime, gambling and police payoffs occurred in the community. She also told him that Asian groups had sued the California Attorney General for the Department of Justice report which characterized Chinese youth gangs as a major organized crime threat. This was the same report that William Lee had told Bergman about. Bergman believed that the Attorney General had later publicly apologized for the report.

Bergman next spoke with Paul Avery, a 15-year veteran reporter of the San Francisco Chronicle, whose specialty was police reporting. Bergman had read an article by Avery on Merle's prosecution of another Chinatown youth "gang" case involving Joe Fong. Avery told Bergman that a youth named Clifton Wong had, through his attorney, admitted that he committed the crime of which Fong was accused and eventually convicted. Bergman's understanding was that although this exculpatory evidence was available to Merle, he did not reveal it at Fong's trial. Avery informed Bergman that Avery's sources in the San Francisco Police Department had informed him that the police were "after" Fong and intended to "put him away" on any charge possible.

Avery also gave Bergman information concerning May Tom. Avery and another reporter interviewed Tom after the Richard Lee trial. Avery stated that according to May Tom, Avery was the first person to inform her that she was the only eyewitness at the Lee trial. She told Avery that McCoy had told her there were 11 other "witnesses" in the Lee case. Avery subsequently arranged for Attorney Paul Halvonik to interview Tom. Avery informed Bergman that Tom gave a statement to Halvonik that was similar to the one she gave to Avery. Avery urged Bergman to get involved in the Lee case.

The following week, Bergman interviewed Paul Halvonik. Halvonik told Bergman that he had taken a statement from May Tom in which she expressed her distress about the Lee case: she felt she had been misled by Merle; she stated she had been shouted at by Merle; she indicated that her identification of Lee was not as strong as it appeared. May Tom also told Halvonik that she was extremely upset with Merle because he had given the jury the impression that if her testimony seemed equivocal it was

because she had been intimidated by Chinese gang members. In fact, she expressly told Merle that she did not feel intimidated at all. Halvonik further informed Bergman that while he did not feel Tom's statements were strong enough to overturn Lee's conviction, he did think that Lee would not have been convicted had the jury known how unsure she was of her identification.

In January of 1975, Bergman wrote to Porter in Federal prison in Indiana. Bergman stated that he was a journalist and researcher investigating the murder trial of Richard Lee and that he wanted to discuss Porter's trial testimony. Bergman alluded to "unorthodox" activities in other cases on the part of the San Francisco police and district attorney. He asked Porter to call him collect if he were interested in discussing what happened during the Lee proceedings.

Shortly thereafter, Porter telephoned Bergman collect. It is *undisputed* that in this first conversation, Porter told Bergman that he had testified falsely at the Lee trial. He told Bergman something had gone on between him and the authorities but that he did not want to go into details because he felt uncomfortable discussing the matter on the telephone. Porter also told Bergman that the authorities had promised him he would not have to return to California to serve more time and that his entire state sentence would be served concurrently with his federal time. For this reason Porter was very concerned about a California detainer lodged against him which would require him to return to California to serve more time after completing his federal sentence.¹¹

Bergman did not know what a detainer was at the time, but told Porter he would try to check on Porter's legal status before visiting him in Indiana. Bergman testified that he did not promise Porter anything. Bergman told Porter that whether he would do anything for Porter "depended" on what happened when they met.

¹¹ A detainer is a written notice of an unserved sentence or pending charge against a prisoner filed by law enforcement officials with prison authorities. It ensures that the detaining authority is notified and has the opportunity to take custody before the prisoner is released. (Smith & Snedeker, Cal. State Prisoners Handbook (1982) § 8.2, pp. 178-179.)

Bergman testified that Porter stated he had never done anything like what he did in Lee's trial; it "weighed" on him. In his notes of this telephone conversation, Bergman recorded the message Porter asked him to take to Richard Lee; "Let Richard know 'forgive me' . . . didn't do it because I wanted." Porter testified that in order to get Bergman to help him with the California detainer, he told Bergman he felt badly about lying at Lee's trial.

Porter acknowledged that in this first telephone call Bergman expressed concern about whether Richard Lee had been properly convicted. Other witnesses in the trial were going to change their testimony, Bergman said, and the San Francisco police had "pressured people." Porter took this statement as a "suggestion" that Bergman might want him to recant his testimony.¹² Porter felt that Bergman wanted to hear that Porter had not testified truthfully in the Lee trial and he thought that Bergman would help him if he recanted his trial testimony. Porter was willing to lie to Bergman in order to get help with his detainer. He asked how he could help and Bergman replied that Porter could help by making an affidavit. Porter told Bergman he was willing to meet with him to discuss the matter further.

Prior to visiting Porter, Bergman met with Attorney Charles Garry who was handling Richard Lee's direct appeal. Garry told Bergman that in his opinion Lee's conviction was a "travesty." He felt the defense had been inadequate and the case contained reversible error. Garry believed that Lee was a member of a group that law enforcement officials had singled out to "get" because they believed the group was guilty of certain crimes. Garry also informed Bergman that the prosecution is obligated to disclose to the defense evidence of promises to or recommendations made regarding a witness, so that the jury can adequately assess that witness's credibility.

Around this time, Bergman spoke with Attorney Patrick Hallinan who informed him he had filed a complaint against respon-

¹² Porter first testified that Bergman told him during this first conversation that he thought Porter's testimony at the Lee trial was false. However, later, Porter flatly denied that Bergman had made such a statement.

dent Merle with the State Bar alleging that Merle had improperly interrogated a witness in another Chinatown case.

Development of Bergman's Relationship with Porter

Bergman visited Porter in prison in January of 1975. Their ensuing interchange is the basis of respondents' contention that Bergman actually knew Porter's allegations against them were false.

Bergman testified that when they met, Porter reiterated that he had lied at Lee's trial due to threats and coercion from respondents and that he had never before done such a thing. He told Bergman he would be willing to testify and to execute a sworn statement to that effect.

Porter testified that Bergman told him he represented Richard Lee and that he had come "to find out about me testifying in the courtroom . . . against Richard Lee." Bergman told Porter he felt that some of the things Porter had testified to were not true. Porter testified Bergman "was wondering" if Porter would be willing "to give another testimony." Porter claimed that when he told Bergman his testimony at the Lee trial was true, Bergman replied that he did not believe it; he thought it was false.

According to Porter, Bergman told him that if he changed his testimony, Richard Lee stood a chance of getting out and Porter would not have to "do that five to life," referring to the California detainer. Porter testified that when Bergman asked him whether McCoy and Erdelatz had threatened him, he said no; but Bergman then asked him again, "like it was—it's not going to work, change of testimony." At that point, Porter changed his story because he felt that Bergman would then help him get released from the detainer.

Porter also testified, however, that Bergman never came right out and told him to say certain things; he just made "suggestions" and used "leading questions." According to Porter, Bergman did not say outright that he wanted him to give an untrue statement; Bergman would not "just come out and say those words, no." Nor did Bergman "just come out and say 'recant your statement.'"

Porter confirmed that he told Bergman he testified falsely at Lee's trial and that it "weighed" on him. He explained that he was angry at respondents and he saw the meeting with Bergman as an opportunity to get back at them. Bergman testified he told Porter that as part of checking into the story, he would probably be checking into the detainer. He denied that he ever promised Porter any help in exchange for Porter's giving an affidavit and denied that there was any understanding to that effect.¹³

While Bergman had questions about some of the information Porter imparted to him, he also believed much of it could be true. He considered Porter to be taking a considerable risk to his personal safety by stepping forward and making allegations of misconduct against the police and prosecutor. He viewed Porter's willingness to give a sworn statement as an indication that he was telling the truth. His and Ramirez's subsequent investigation and discovery of information relating to the conduct of respondents in other cases increased his feeling that Porter's charges were believable. For these reasons and because of Porter's stated willingness to testify as well, it never occurred to Bergman that he was being conned.

After his interview with Porter, Bergman worked with William Lee in arranging for Indianapolis Attorney John Manning to take Porter's affidavit. Manning met with Porter in February and again in April of 1975. Based on his notes from these interviews, Manning prepared an affidavit which Porter signed in July of 1975. (See Appendix D.) Bergman did not participate in the preparation of the affidavit.¹⁴ Manning testified that at some point before the articles were published, he indicated to Bergman that

¹³ Bergman made notes of this interview and later transformed them into a typewritten summary. he noted that "... much of the conversation with Porter revolved around his feelings concerning Richard's imprisonment. He asked about Richard's condition and expressed regret." According to Bergman's notes, Porter told him he understood that, in Porter's words, "actions are what count," and that until then, Bergman and others "could promise little help."

¹⁴ In addition to recounting what Porter told Bergman in their interview, the affidavit alleged that when Porter refused to testify as respon-

he had some doubt about Porter's veracity. Bergman testified that Manning commented only about the lack of weight the testimony of Porter, a convict, would have in a legal proceeding.

Between February and June of 1975, Bergman inquired about the status of Porter's detainer, as he indicated he would do, and corresponded with Porter on this issue. Bergman believed there might be a record of any promise made to Porter that he would not have to return to California. Bergman contacted Attorney Bruce Hotchkiss who confirmed that there was a letter in Porter's file reflecting a recommendation from law enforcement officials regarding the detainer. In addition, Bergman was referred through Attorney Halvonik to Alice Lytle in the Governor's office. Bergman contacted Lytle and informed her of Porter's concerns about the detainer. She apparently suggested Porter write to the Governor's office directly; Bergman passed that address on to Porter.

In June, Bergman wrote to Porter regarding Porter's concern that unless the detainer were dropped, he might still be in custody when he returned to California to testify on Lee's behalf in connection with the affidavit. Porter was afraid his life would be in danger under those circumstances. Bergman wrote that "... we should be clear about my role: (1) I'm trying to set the record straight and that is my motivation; (2) I can't make promises or go to bat for you in a full scale way until Manning finishes otherwise it will all get very complicated. I thought we had a clear understanding there."

According to Bergman, he wrote this letter to Porter because he needed Porter to step forward with his allegations in a sworn affidavit so there would be documentary proof that a "deal" had been made between Porter and respondents. The "understanding" was that Porter would "go through all the way" and sign the affidavit to make up for the lies he told against Lee. Bergman would then try to protect him as much as he could should Porter have to return to California to testify in the Lee matter.

Bergman felt that unless Porter were willing to step forward with a sworn statement as he had initially indicated he would, the

dents had instructed. McCoy and Erdelatz took him to an elevator near their office where they struck, kicked, and threatened to kill him.

situation would become complicated because Porter would be "put on the spot as to whether or not he had said these things." Bergman testified he was not sure he would have been so concerned about Porter unless Porter had been willing to sign the affidavit. Bergman denied that "going to bat in a full scale way" meant helping on the detainer; instead it referred to those efforts he would make to ensure Porter's safety once he did commit himself in a sworn statement.¹⁵

Investigation by Bergman and Ramirez

In April of 1975, Bergman and William Lee persuaded the Examiner to pursue the Richard Lee story. Appellant Ramirez, a reporter for the Examiner, was assigned to work with Bergman in developing and investigating the story. Bergman's role was to cooperate with Ramirez in the investigation and to maintain contact with Porter. Ramirez's role was to investigate and write the articles. During the following year, Bergman and Ramirez interviewed between 35 and 40 people including attorneys, law enforcement officials, writers and experts on Asian youth and community issues, and friends and associates of Richard Lee. They also reviewed documents on Lee's background and the court files and police records in his and other cases.

In the course of these efforts, the reporters uncovered several items which *in their minds* directly and indirectly corroborated Porter's allegations. The most significant of these involved perceived misconduct by respondents in the circumstances.¹⁶

1. The reporters located a pretrial discovery order in the Lee case requiring the prosecution to furnish the defense with, inter

¹⁵ On August 19, 1975, Alice Lytle informed Porter by letter that the California parole board had authorized the parole board at Terre Haute to handle the parole determination on his state charges, thereby eliminating the necessity of his being returned to California for a parole hearing.

¹⁶ It should be emphasized that whether any misconduct occurred is irrelevant to resolution of the issue of appellants' subjective state of mind. Instead, it is appellants' subjective attitude toward the information they discovered which properly bears on the issue of actual malice.

alia, any and all statements, admissions and/or confessions of the accused and any and all statements of people who might be called as prosecution witnesses. They knew from conversations with Lee's trial attorney and from their reading of the trial transcript, that respondent Merle had not disclosed Porter's existence until the first day of trial. They also knew that the trial judge had denied a defense request for a continuance based on the disclosure of surprise witness Porter. Therefore, appellants perceived Merle's failure to disclose Porter's existence as an indication of misconduct, as corroborative of Porter's misconduct allegations, and as further support for their theory that Lee was denied a fair trial.¹⁷

2. The reporters learned that after trial and before sentencing, without notifying Lee's counsel, McCoy and Erdelatz brought Lee to the homicide bureau for questioning about another case. McCoy later informed the probation department that during this interrogation, Lee had "confirmed" that the evidence presented at his trial was correct. Lee, however, told Ramirez this was untrue. The reporters argued that the conduct of McCoy and Erdelatz in speaking to Lee before sentencing and without counsel was improper and that it was highly improbable that Lee had discussed his case.¹⁸

3. Porter steadfastly maintained he had been "promised" certain benefits for his trial testimony in the Lee case.¹⁹ The reporters checked with attorneys and reviewed records which

¹⁷ Merle testified that he did not reveal Porter's existence until the first day of trial because he did not believe the discovery order included confidential informants such as Porter.

¹⁸ Erdelatz testified that Lee did not say much during this posttrial interrogation, but just nodded his head affirmatively in response to questioning by McCoy.

¹⁹ Porter continued to maintain in this case that before he testified in the Lee case, respondents promised him that his state sentence would be served concurrently with his federal sentence; that his entire sentence would be served in federal institutions; that he would not be returned to California to serve time; and that his crime partner and girlfriend would be released from custody after 90 days observation.

indicated to them that some type of arrangement had in fact been made between Porter and one or more of respondents in exchange for Porter's testimony. The removal of Porter's detainer by the parole board in late 1975 superficially corroborated Porter's claim that he benefited in exchange for his testimony. From the reporters' perspective, respondents acted improperly both by promising Porter benefits for his testimony and by not disclosing the arrangement to the defense.

4. The reporters also learned of formal and informal complaints against respondent Merle in other cases. Attorney Patrick Hallinan gave them a copy of his formal complaint against Merle to the State Bar. Hallinan maintained that Merle had improperly interrogated his client, Dean Tom, despite his knowledge that Tom was represented by counsel. Later, according to Hallinan's charges, Merle had lied in court about the matter.

In addition, Paul Avery informed both reporters that Merle had suppressed exculpatory evidence involving Clifton Wong's confession that he committed the crime for which Merle was prosecuting Joe Fong. Similarly, Dennis Flanders, who worked at the Police Activities League and had testified against Joe Fong, informed Ramirez that he believed Fong had been "framed" and unfairly convicted. Ramirez also read a newspaper story which reported a case in which an attorney was cited for contempt of court for having told Merle, a witness in the case, to "crawl down from the witness stand."

5. Porter told Bergman that during one of his meetings with Merle, he overheard Merle telephone a United States Army sergeant and suggest that an Asian man be dishonorably discharged in retaliation for failing to cooperate with Merle on a murder case. In the course of their investigation, Bergman and Ramirez obtained a copy of a letter from Merle to Major G.W. Sims memorializing their earlier telephone conversation concerning Johnson Lam, who was apparently under Sim's authority. In the letter, Merle stated that Lam, a victim of a severe beating by a Chinese youth gang, refused to testify and was extremely uncooperative, evasive and angry. Merle characterized Lam as having a "negative attitude towards a serious problem in . . . society as well as a problem of his own people. . . ."

The reporters argued that this letter was corroborative of Porter's version of Merle's telephone call.

6. Bergman and Ramirez also had access to a transcript of an interview between Attorney Sandra Terzian and May Tom as well as an affidavit by May Tom prepared by Attorney Roger Ruffin. Therefore, they were aware of Tom's sworn statement that she was unsure of her identification of Lee as Leong's killer and that her attempts to communicate this uncertainty to respondents had been met with anger and misrepresentations about the importance of her role in the case.²⁰ Ramirez interviewed May Tom four or five times and had several telephone conversations with her about her testimony in the Lee case.

The reporters attempted to corroborate Porter's story through other channels as well. For example, Ramirez worked with several sheriff's deputies in an unsuccessful effort to locate jail records which might document the many meetings Porter alleged he had with respondents. The department's undersheriff informed Ramirez that record keeping was often intentionally incomplete due to security concerns. As a result, Ramirez did not consider his inability to locate any records on Porter's movement as undercutting Porter's claim that he had met with respondents numerous times.

²⁰ May Tom's affidavit contained additional allegations of misconduct against respondents. She averred that she selected Lee's photograph as the killer because she had seen him in Chinatown in the past and that when McCoy and Erdelatz were showing her photographs she was under the impression she had to keep looking until she picked someone out. She subsequently believed she had made a mistake in her selection of Lee as the killer but when she informed McCoy and/or Erdelatz of this, one of them told her there were 11 other witnesses who had identified Lee as the gunman.

She further declared that she picked Lee at the corporeal lineup because when she told the police she was not sure she could recognize Leong's killer, someone, probably McCoy, told her just to pick out the person whose photograph she had selected earlier. When she told Merle she was uncertain of her identification he became very angry at her. She stated she identified Lee at the preliminary examination even though she did not believe he was the gunman.

Bergman and Ramirez also made repeated but unsuccessful efforts to locate three persons—Porter's sister, his crime partner and girlfriend, and missionary—to whom Porter said he had previously related his allegations about respondents.

Apart from attempting to corroborate Porter's charges against respondent, the reporters gathered information regarding other aspects of the Lee case. For example, they spoke with Lee's attorney, Lee's friends and associates, and with alibi witnesses never called to testify by the defense. They interviewed Weyman Tso several times. Tso reiterated the gist of his sworn affidavit which William Lee had shown Bergman: Tso had witnessed the shooting of Leong and knew that Lee was not involved.

Finally, the reporters contacted several people to gather background information on Chinese "youth gangs" and on the relationship between the Chinatown community and law enforcement.²¹

²¹ They interviewed: Sergeant George Huegle of the San Francisco Police Department Intelligence Unit, an officer familiar with the Chinatown community; Inspector Herb Lee of the San Francisco Police Department Juvenile Detail, who was familiar with Chinatown youth; Inspector Diarmuid Philpott, a specialist on Chinatown and Chinatown youth; Officers Terry Sullivan and Dennis Flanders of the San Francisco Police Activities League; Officer Leon Getchell of the San Francisco Police Department Narcotics Division; Officer Fred Lau of the San Francisco Police Department Community Relations Unit; Inspector Art Fobbs of the Juvenile Bureau of the San Francisco Police Department; Captain James Curran of the San Francisco central police station; Officer Art Tappia of the San Francisco Police Department and a board member of Chinese Youth Alternatives; Wayne Yee and Ron Albers of Chinese Youth Alternatives; Atea Koon, director of the Youth Service Center in Chinatown; Donald Wong, staff member with Chinese for Affirmative Action; Jack Woo, president of the Chinese Six Companies; Rose Pak, a San Francisco Chronicle correspondent; George Woo, a professor of Asian American studies at San Francisco State University; Al Martinez, a reporter for the Los Angeles Times, who had written a story about Chinese youth violence; Cynthia Gurney, a reporter for the Washington Post, who was preparing a story on Chinatown youth crime; Jennifer Thompson, who was preparing to write a story about Richard Lee and Joe Fong for San Francisco Magazine; Reverend Gordon

Ramirez and the State Bar Allegations Involving Merle

During the course of appellants' investigation, attorney Patrick Hallinan provided Ramirez with a copy of the letter he had filed against Merle with the State Bar of California. As noted, this letter charged that despite Merle's knowledge that Hallinan represented Dean Tom, Merle had improperly interrogated Tom without counsel. Hallinan also told Ramirez that it was his understanding there had been a recommendation within the bar that Merle be disciplined on the Tom matter.

Several months later, Ramirez checked with Hallinan again about the status of Merle complaint. Hallinan told Ramirez that a full committee of the bar had reversed a panel's earlier recommendation that Merle be disciplined. Ramirez was also informed by someone at the State Bar that as a matter of policy the bar did not release information about pending complaints.

In the article of May 21, 1976, Ramirez wrote that a State Bar disciplinary review committee had decided to sanction Merle for his alleged misconduct in a 1973 Chinatown case. Ramirez added that according to State Bar officials, no official action had been taken. Ramirez's original draft of this article stated that a bar panel had recommended that Merle be sanctioned for alleged misconduct, but that "a larger committee overturned this suggestion." Ramirez testified that after he wrote this draft, but prior to publication, he received "additional information" that caused him to change the story to its final version, omitting any reference to the fact that the recommendation to impose sanctions had been overturned. He further testified that when he submitted that final version for publication, he believed it was accurate.

MacLain, executive director of Youth for Christ in Santa Clara County, who had written about youth in Chinatown and youth and delinquency in other communities and had visited Joe Fong in prison; Gary Pang, a friend of Richard Lee and Joe Fong; Ben Fong Torres, the brother of Barry Fong Torres, who was killed the night Joe Fong and Richard Lee were arrested; and Joe Fong.

IV.

This case presents "the delicate and sensitive task of accommodating the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation." (*Ollman v. Evans, supra*, 750 F.2d at p. 974.) Libel laws recognize that each person has a right not to be disparaged by false statements. (Eldredge, *The Law of Defamation* (1978) § 4, p. 8.)²² Society's interest in redressing the harm done to one's reputation is strong. (*Rosenblatt v. Baer, supra*, 383 U.S. at p. 86 [15 L.Ed.2d at pp. 605-606].) Moreover, this court is not unmindful that "[t]he harm done to one's reputation by erroneous charges of corruption or dishonesty can never be fully undone For even an erased question mark still suffices to raise the question, where perhaps none existed before." (Bird, *The Role of the Press in a First Amendment Society* (1980) 20 Santa Clara L.Rev. 1, 8 [hereafter *Role of the Press*].)

There exists a substantial tension between the protection of these reputational interests and the commitment to free debate. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 342 [41 L.Ed.2d 789, 806-807, 94 S.Ct. 2997].) Few events place this tension in such graphic relief as when false accusations of corruption are disseminated in an irresponsible and gratuitous fashion by an indifferent and powerful press.

Nevertheless, press responsibility is not constitutionally mandated nor can it be legislatively or judicially compelled. (See *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 256 [41 L.Ed.2d 730, 740, 94 S.Ct. 2831].) The First Amendment grants the press a privilege to report and comment upon official actions with no requirement that an individual's reputation be spared. (*Rosenbloom v. Metromedia, supra*, 403 U.S. 29, 62

²² " 'Good character, or reputation, consists of the general opinion of people respecting one. It is built up by a lifetime of conduct. It is probably the dearest possession that a man has, and once lost is almost impossible to regain. The possession of a good reputation is conducive to happiness in life and contentment. The loss of it, . . . brings shame, misery and heartache.' " (Eldredge, *The Law of Defamation, supra*, at pp. 12-13, quoting Judge James Gay Gordon, Jr.)

[29 L.Ed.2d 296, 322], conc. opn. of White, J.) As this court recently observed: "Fair and objective reporting may be a worthy ideal, but there is also room, within the protection of the First Amendment, for writing which seeks to expose wrongdoing and arouse righteous anger . . ." (*Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 259.)

The constitutional protections afforded the media under *New York Times* present a formidable barrier to public official plaintiffs. Equally formidable, however, are those principles which prompted the high court's articulation of the concept of constitutional malice.

The public possesses an "independent interest" in the qualifications and performance of its public officials. (See *Rosenblatt v. Baer*, *supra*, 383 U.S. at pp. 85-86 [15 L.Ed.2d at p. 605]; *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 153 [18 L.Ed.2d 1094, 1110, 87 S.Ct. 1975].) To effectuate this interest, the public relies upon the press as its agent to gather and disseminate this information (see *Saxbe v. Washington Post Co.* (1974) 417 U.S. 843, 863 [41 L.Ed.2d 514, 527, 94 S.Ct. 2811] (dis. opn. of Powell, J.)), as well as to provide a forum for the expression of criticism and opinion.

"The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." (*Mills v. Alabama* (1966) 384 U.S. 214, 219 [16 L.Ed.2d 484, 488, 86 S.Ct. 1434].)

Indeed, the press is our citizenry's single most important check on governmental misconduct and secrecy. (*Role of the Press*, *supra*, 20 Santa Clara L.Rev. at p. 3.) Informed public opinion is "the most potent of all restraints" upon governmental wrongdoing or mismanagement. (*Grosjean v. American Press Co.* (1936) 297 U.S. 233, 250 [80 L.Ed. 660, 668-669, 56 S.Ct. 444].)

However, it is often impossible for an individual to obtain information about misconduct in government unless the press

provides it. (Note, *The Right of the Press to Gather Information Under the First Amendment* (1978) 12 Loyola L.A. L.Rev. 357, 359.) Thus, it is fundamental that "[c]riticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." (*Rosenblatt v. Baer, supra*, 383 U.S. at p. 85 [15 L.Ed.2d at p. 605]; *Gomes v. Fried, supra*, 136 Cal.App.3d at p. 932.)

This court's independent examination of the record must be conducted against the backdrop of our society's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (*New York Times, supra*, 376 U.S. at p. 270 [11 L.Ed.2d at p. 701].)

For these reasons, respondents as public officials must sometimes bear scathing and even false attacks subject only to those narrowly circumscribed exceptions embodied in the concept of actual malice. The public's interest in reports of official misconduct, *even if they are factually erroneous and damaging*, outweighs the reputational interest of any individual. (See *New York Times, supra*, 376 U.S. at pp. 271-272 [11 L.Ed.2d at p. 701].)

As noted, liability under *New York Times* requires clear and convincing proof of a knowing falsehood or of reckless disregard for the truth. (*New York Times, supra*, 376 U.S. at pp. 285-286 [11 L.Ed.2d at pp. 709-710].) Recovery by public officials in defamation actions is constitutionally barred unless evidence is produced "of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity'" (*St. Amant v. Thompson, supra*, 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].)

Reckless disregard for the truth "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." (*St. Amant, supra*, 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].) Lack of due

care is not the measure of liability, nor is gross or even extreme negligence. (*Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 259, fn. 11.)

St. Amant named several circumstances which may give rise to serious doubts. "The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (*St. Amant*, *supra*, 390 U.S. at p. 732 [20 L.Ed.2d at pp. 267-268].)

However, as this court recently explained, neither investigatory failures, proof of the publisher's ill will, nor lack of objectivity will necessarily deprive even a defamatory falsehood of privileged status. (See *Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at pp. 258-259; *St. Amant*, *supra*, 390 U.S. at p. 733 [20 L.Ed.2d at p. 268]; *Gomes v. Fried*, *supra*, 136 Cal.App.3d at pp. 934-935.)

In order to substantiate their claim of actual knowledge of falsity, respondents rely primarily on several pieces of Porter's deposition testimony. They assert this testimony establishes with convincing clarity that an arrangement was made between Porter and Bergman whereby Porter would provide a false affidavit in exchange for Bergman's help in getting the detainer lifted. Respondents also argue appellants were reckless in ignoring information and failing to pursue several areas of investigation which would have demonstrated that Porter's affidavit was false and that Richard Lee was guilty.

Appellants, in turn, contend that the investigation they undertook to corroborate Porter and to develop the Richard Lee story proves their good faith belief in the probable truth of Porter's allegations. They argue that no deal was struck between Porter and Bergman and that they cannot be faulted for relying on Porter

since they uncovered a substantial amount of information which they honestly believed corroborated Porter's veracity. Appellants maintain that respondents seek to impose a double standard whereby respondents could rely on Porter to prove up their libel claim, but would preclude appellants' similar reliance upon Porter in publishing the articles. Appellants also contend that their thoroughness in investigating the entire context of the Lee case establishes that they published without malice.

Initially, respondents argue that Porter's testimony concerning the prison interview shows that Bergman not only knew the affidavit was false but helped create it. The record, however, is not nearly so clear.

The tone of the prison interview was established by Porter during the first telephone conversation with Bergman. Porter not only told Bergman he had lied at the trial because of something respondents had done, but also expressed great remorse and even begged Lee's forgiveness. Bergman's testimony, and especially his contemporaneous notes of that conversation ("Let Richard know 'forgive me' . . . didn't do it because I wanted") strongly corroborate Porter's account. But it is Porter's *own* testimony that leaves no doubt he intended to and did convince Bergman that he was speaking the truth when he claimed to have lied at trial. Porter's admitted motive for lying was to get Bergman to visit him in order to obtain Bergman's assistance with the detainer.²³

Bergman experienced an "emotional reaction" to this conversation in which Porter so persuasively pleaded for forgiveness and divulged his feelings of guilt and remorse. Bergman gave a lot of credence to Porter, particularly because Porter was allowing him to visit. In addition, by the time of the visit, several ostensibly credible sources²⁴ had given Bergman reason to believe that there

²³ Porter had already made several inquiries about the detainer to other people and organizations. He testified his only concern was to get the detainer released and he was willing to do anything, and to use anyone, to accomplish that end.

²⁴ These sources were William Lee, reporter Avery, and Attorneys Garry, Halvonik and Hallinan.

might have been serious problems with the manner in which Lee was convicted, and that the persons responsible for producing Porter as the state's key witness might have engaged in questionable behavior in Lee's case and others. In view of Bergman's state of mind, his reaction to Porter's momentary story change at the subsequent interview was neither surprising nor suspect.

According to Porter, Bergman opened the interview by reiterating the very thing Porter told him over the telephone: he believed some of Porter's trial testimony was false. He was interested in getting a statement from Porter to that effect, or in Porter's words, "another testimony." When Porter told Bergman he had told the truth at trial, Bergman expressed disbelief and said he thought the testimony was false.

It is unclear from Porter's deposition testimony whether this response—the lynchpin of respondents' argument—merely reflected Bergman's confusion over the discrepancy between Porter's posture on the telephone and his new position (i.e., he thought Porter had told him that the testimony was false); or reflected Bergman's statement of his own belief that Porter had lied.

In either case, respondents err in relying on this isolated piece of ambiguous evidence as sufficiently *clear and convincing* proof that Bergman knowingly solicited the intricate lie that Porter proceeded to tell and tell again. As the Supreme Court stated in *Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, "[a]nalysis of this kind may be adequate when the alleged libel purports to be an . . . account of events that speak for themselves," but is not appropriate where the event in issue "bristle[s] with ambiguities." (466 U.S. 485 at pp. 512-513 [80 L.Ed.2d at p. 525], italics omitted.)

Bergman's reaction prompted Porter immediately to look to Bergman for cues and to fashion his story accordingly. He interpreted Bergman's remarks as "suggestions" of what Bergman wanted to hear.²⁵ Experienced at manipulation, Porter was able to

²⁵ Porter's testimony that "[n]obody comes out and says something. You know, you just only suggest," itself indicates that he may have had

identify Bergman's concern that Lee had been unfairly convicted and exploit it. Porter acknowledged that Bergman did not tell him to say anything. In fact, by the time he gave his affidavit to Manning, Porter was quite convinced he had managed to "run a scam" on both Bergman and Manning.²⁶

Furthermore, there is no evidence that Bergman's request that Porter give another story was a request that Porter give *false* testimony, although Porter apparently construed it as such a "suggestion," or came as a response to Porter's telling him that he had told the truth at trial.

Rather, the record as a whole indicates that Bergman asked Porter if, based on what Porter had told him about respondents' behavior, he would be willing to step forward to right the wrong he had committed against Lee—to give a different statement than he had given at trial. This evidence is a far cry from clear and convincing proof that Bergman's request that Porter give a different story was a request that Porter *lie*.

The record does demonstrate that Bergman agreed to help Porter on the detainer matter because Porter was willing to execute a sworn statement documenting his oral allegations. Bergman testified that he probably would not have continued to make inquiries about the detainer had Porter not signed the affidavit. However, unless Bergman were actually aware that Porter's claims were false, nothing illicit existed between them.²⁷

a propensity to construe virtually anything said to him as a "suggestion" of what he should say or do.

²⁶ Porter testified that the reason he included so many of the defamatory details in the affidavit he recited to Manning was because he thought they would make his story more believable.

²⁷ Bergman's denial at trial that any arrangement was made between him and Porter regarding the detainer may indicate Bergman's misconception of what transpired or even a "capacity for rationalization." (*Bose, supra*, 466 U.S. at pp. 512, 513 [80 L.Ed.2d at pp. 524, 525].) However, neither this testimony nor Bergman's letters to Porter reporting on his inquiries about the detainer demonstrates that Bergman knew Porter was lying.

While it may have been foolish and even grossly negligent of Bergman to entertain any discussion at all about the detainer at the same time he was asking Porter to swear to his accusations in an affidavit, this juxtaposition of events is of no moment if Bergman did not know Porter's accusations were false. Bergman's offer to make inquiries on behalf of someone incarcerated and unable effectively, or as easily, to fulfill a promise both men believed respondents had already made, was not nefarious. Absent knowledge of falsity, any arrangement between Porter and Bergman regarding the detainer was lacking in constitutional malice *considering Bergman's subjective viewpoint*.

In sum, the conversation that occurred during the interview is constitutionally inadequate to support a conclusion either that Bergman knew Porter's allegations were false or that he fabricated them. It may be appropriate to fault Bergman for his credulity, his failure to be more cynical or guarded in his responses to Porter, and particularly for his ill-timed offer of assistance with the detainer. However, the ambiguous statements and conduct upon which respondents rely do not demonstrate with convincing clarity that Bergman acted with knowledge of falsity.

Respondents also contend that appellants were reckless for failing (1) to reject Porter as an obviously biased source; (2) to reject his charges as inherently incredible; and (3) to investigate adequately his accusations. Respondents analogize appellants' reliance on Porter to the defendants' reliance on informant Burnett in *Curtis Publishing Co. v. Butts*, *supra*, 388 U.S. 130.

However, the plurality opinion in *Butts*, a "public figure" case, analyzed the adequacy of the investigation undertaken in preparation of the article in terms of whether it showed "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." (388 U.S. at p. 155 [18 L.Ed.2d at p. 1111].) This court has previously noted in *Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 258, fn. 9, that the *Butts* standard is an *objective* one which has since been superseded by the subjective standard propounded in *St. Amant v. Thompson*,

supra, 390 U.S. 727. Accordingly, respondents' reliance on *Butts* is misplaced.

Therefore, we must look to *St. Amant* for guidance. That case concerned a television broadcast in which defendant, St. Amant, repeated charges made by one Albin, a member of the Teamsters Union, that plaintiff Thompson, a deputy sheriff, had been involved in illegal payoffs and official corruption with St. Amant's political opponent. The Supreme Court held that Thompson had not satisfied his constitutional burden of showing that St. Amant's reliance on Albin was reckless.

In explaining the holding, the high court first clarified that in order to find a defendant published with reckless disregard, there must be either (1) "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication"; or (2) "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (*St. Amant, supra*, 390 U.S. at pp. 731, 732 [20 L.Ed.2d at pp. 267, 268].) The court then made the following observations of Albin's reliability. However, the most the state court could say was that there was no evidence in the record of Albin's reputation for veracity, and this fact merely underlines the failure of Thompson's evidence to demonstrate a low community assessment of Albin's trustworthiness or unsatisfactory experience with him by St. Amant.

"Other facts in this record support our view. St. Amant made his broadcast in June 1962. He had known Albin since October 1961, when he first met him with members of the dissident Teamsters faction. St. Amant testified that he had verified other aspects of Albin's information *and that he had affidavits from others*. Moreover *Albin swore* to his answers, first in writing and later in the presence of newsmen. According to Albin, he was prepared to substantiate his charges. St. Amant knew that Albin was engaged in an internal struggle in the union; *Albin seemed to St. Amant to be placing himself in personal danger by publicly airing the details of the dispute.*" (390 U.S. at p. 733 [20 L.Ed.2d at p. 268], italics added.)

Preliminarily, it should be noted that Porter's charges that he had been coerced, struck and otherwise improperly induced to testify are not inherently improbable. *New York Times* and its progeny are founded upon the assumption that corruption at all levels of government, including those branches charged with enforcement and prosecution of the penal laws, exists and needs to be aired.

Moreover, on October 27, 1977, this court granted Richard Lee's petition for hearing, which was supported by Porter's allegations against respondents, and issued an order to show cause why relief in Lee's habeas corpus matter should not be granted. The superior court was ordered to hold an evidentiary hearing on the factual disputes raised by the petition.²⁸

Significantly, in determining whether to grant such relief, this court had before it not only Porter's original affidavit but also his sworn recantations of that document contained in his affidavit of July 22, 1976, and in his deposition testimony. Therefore, appellants can scarcely be considered reckless for not rejecting Porter's allegations out of hand when this court has previously found those same charges to be sufficient to warrant further judicial intervention.

Appellants, and particularly Bergman, had reason to believe most of Porter's story. Porter was very worried that his life would be in jeopardy should he be returned to California to testify on Lee's behalf. There, Porter would be under the physical control of the people he had accused of misconduct. He expressed these concerns to Bergman several times. Like the source in *St. Amant*, Porter swore to his allegations in writing and told Bergman he was willing to testify if Bergman would "go to bat" for him and help assure his personal safety. Porter seemed to Bergman "to be placing himself in personal danger by publicly airing the details . . ." of his charges against respondents. (*St. Amant, supra*, 390 U.S. at p. 733 [20 L.Ed.2d at p. 268].)

²⁸ The order was signed by associate Justices Manuel, Richardson, Mosk and Newman and by Chief Justice Bird.

Bergman's opinion of Porter's veracity was further influenced by Roger Ruffin, an experienced attorney and former municipal and superior court judge. Ruffin told Bergman that in his opinion the materials in the habeas corpus matter including Porter's affidavit constituted an excellent case for relief, and that Lee's habeas corpus case was one of the most complete he had seen.²⁹ (Contrast, *Curtis Publishing Co. v. Butts*, *supra*, 388 U.S. at p. 158 [18 L.Ed.2d at pp. 1112-1113] [media defendant's conduct held highly unreasonable due to failure to check source's story with someone knowledgeable in the field].)

Finally, it is noteworthy that respondents now seek a ruling from this court that since Porter was a prisoner with something to gain, there were obvious reasons to doubt his credibility and thus any reliance on Porter was reckless. Yet, thrice in the history of these proceedings, respondents have relied upon statements and stories from Porter: once, to convict Richard Lee; a second time to defeat Lee's habeas corpus claims; and a third time to obtain a multi-million dollar libel judgment. These litigious ironies do not excuse appellants from accountability for recklessness *if* they possessed a " 'high degree of awareness of . . . probable falsity.' " (See *St. Amant*, *supra*, 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].) However, they do undermine the strength of respondents' suggestion that "only a reckless man" could have believed the things Porter had to say. (*Id.*, at p. 732 [20 L.Ed.2d at p. 268].)

The Supreme Court has consistently confirmed that in the constitutional malice context, failure to investigate does not in and of itself establish bad faith. (See, e.g., *St. Amant*, *supra*, 390 U.S. at p. 733 [20 L.Ed.2d at p. 268]; *New York Times*, *supra*, 376 U.S. at pp. 287-288 [11 L.Ed.2d at p. 711]; *Beckley Newspapers v. Hanks*, *supra*, 389 U.S. 81, 84-85 [19 L.Ed.2d 248, 251-252].) Respondents nevertheless point to investigational deficiencies and claim these demonstrate reckless conduct. However, this court notes that appellants uncovered information during their

²⁹ As noted, Ruffin included Porter's affidavit as an exhibit to the petition for writ of habeas corpus filed in superior court shortly after the articles were published.

one-and-a-half-year investigation which in their minds corroborated Porter's charges.

For example, appellants obtained independent information which they believed substantiated Porter's claim that respondents had made certain promises in exchange for his testimony. They spent several hours trying to locate jail records to support Porter's claim that he had repeatedly met with respondents. They attempted, albeit unsuccessfully, to find examples of prior recitations by Porter of his story. In their opinion, there was no necessary correlation between the failure to locate certain witnesses or records and any lack of veracity on Porter's part.³⁰

Most importantly, they learned from several sources that respondents had been accused by others of misconduct and questionable practices. Again, whether these similar accusations of misconduct were true is not in issue. What is dispositive is that appellants relied upon these ostensibly credible sources in forming a judgment that Porter's claims might have some validity.

³⁰ Two examples illustrate that appellants' reasoning was arguably sound. Porter himself, testifying as respondents' key witness, never changed his story that he did in fact know a missionary named Louis Abbott who had visited him in jail. Although Bergman testified that someone at the jail told him a missionary named Louis Abbott did exist, respondents point to appellants' failure to document Abbott's existence as evidence of recklessness. Yet according to Porter, respondents' own witness, Abbott did exist. Thus, the fact that appellants were unable independently to document Abbott's existence does not establish that Porter invented him.

Similarly, Porter claimed in the original affidavit that he had received treatment at a "jail hospital" for a cyst which had been seriously aggravated when respondent Erdelatz kicked him. Later, although Porter recanted his allegation that he had been kicked, he testified on behalf of respondents that he had in fact received hospital treatment for a cyst that developed after he fell out of bed. When Ramirez attempted to locate medical records of the cyst to corroborate Porter's allegation that he had been kicked, sheriff's deputies informed him that they were unable to locate any such records. Again, appellants' inability to lay their hands on this documentation does not necessarily establish that Porter was not treated for a cyst.

In addition, appellants interviewed a variety of sources, from police officers to lawyers to Asians active in the Chinatown community, in order to explore Porter's charges and to understand the relationship between law enforcement and Asian youth in Chinatown. Appellants were also told by members of the police force that other Asian youths like Lee had been "framed" on false charges.

Appellants had some reason to doubt Porter's credibility. Manning had opined to Bergman that he had "some doubt" about Porter's veracity, although Bergman apparently constructed this remark as a comment on Porter's chances of being believed in court in view of his status as a convict. Bergman knew that Porter was concerned about the detainer and wanted assistance. In the text of the affidavit, Porter made some superficially outlandish claims that neither of the reporters took literally.³¹ Ramirez also wrote a note to his superiors at the Examiner at the outset of his investigation indicating that Porter's statements should be viewed with "skepticism."

These questions about Porter did not rise to the level of "serious doubts." And in any event, they were largely dispelled as a result of the investigation undertaken in response to Porter's charges and appellants' subjective beliefs concerning the information they uncovered. The record as a whole supports the conclusion that at the time the articles were published, appellants did not possess a subjective awareness of probable falsity. (See *St. Amant, supra*, 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].)

Finally, respondents posit that appellants were reckless by failing to reinterview Attorney Stanley Golde with whom Richard Lee had met to discuss a potential defense when he first learned he was being sought by the police in connection with the Leong homicide. Golde had told Bergman that the information he had about Lee would not be beneficial to the reporters. Bergman testified that he construed Golde's statement to mean that

³¹ For example, Porter claimed he had met with Merle "perhaps 30 times" for several weeks prior to trial in order to rehearse the written version of his trial testimony. Porter also stated that respondent McCoy promised him \$35,000 in order to provide bail for Porter's girlfriend.

whatever information Golde had about Lee "might not be helpful" and could have been detrimental to Lee. The reporters decided that it was not in their interest to recontact Golde.

Assuming *arguendo* that respondents are correct when they speculate that Golde would have told appellants that Lee was guilty, this knowledge would not have seriously affected their view of Porter's veracity. Porter never told Bergman nor did he swear in the affidavit, that he knew Lee was innocent. Indeed, Porter declared in the first affidavit that Richard Lee would not talk about his case to Porter.

Respondents have never contended they were libeled by the articles's suggestion that Lee might be innocent. Their claim is based exclusively on Porter's published allegations. The "sting of the libel" (*Curtis Publishing Co. v. Butts, supra*, 388 U.S. 130, 138 [18 L.Ed.2d 1094, 1101].), was that respondents improperly procured Porter's testimony about Lee. This "sting" would have remained had appellants published the identical charges of official misconduct, but conceded Lee's guilt. Similarly, the fact that appellants might have had reason to believe Golde would tell them Lee was guilty bears little if any relationship to their subjective belief in Porter's veracity.

Appellants were not obliged to assure themselves beyond a reasonable doubt that Lee was innocent before airing charges of official misconduct. These charges were logically independent of his guilt or innocence.³² Appellants' states of mind as to Richard Lee's guilt or innocence are not determinative of their subjective attitudes toward the truth or falsity of Porter's charges.³³

³² Appellants were clearly motivated in part by a belief that Lee was "framed." But both reporters testified that a primary concern was the propriety of the overall process by which Lee was convicted. As Ramirez testified, "The questions that were being raised were newsworthy and needed to be reported regardless of [Lee's] guilt or innocence. . . ."

³³ Similar reasoning applies to Ramirez's failure to ask Lee about the bullets that were found in Joe Fong's car in which Lee was a passenger on the night he was arrested. Respondents claim that Ramirez's failure to question Lee about the bullets is clear and convincing evidence of Ramirez's recklessness toward the truth or falsity of Porter's charges.

Respondent Merle additionally contends that the information contained in the May 21st article about the State Bar disciplinary proceedings was published with actual malice. At trial, Merle's counsel argued that this portion of the article constituted a known falsehood in that (1) Hallinan had told Ramirez that the bar had decided not to impose sanctions, and (2) Ramirez completely fabricated his testimony that "additional information" led him to believe that the recommendation to impose sanctions had not been overturned.

Respondents were able to make these arguments because the trial court erroneously ruled that Ramirez could not testify that the source of his "additional information" was reporter Larry Hatfield. Hatfield had covered State Bar affairs for years and Ramirez considered him to be a reliable source.

During discovery Hatfield testified that he informed Ramirez that a disciplinary review committee had decided to impose "unspecified disciplinary action" against Merle. Hatfield had obtained this information from a qualified State Bar source. However, Hatfield refused to divulge his bar source.

Respondents obtained a commissioner's order that should Hatfield fail to disclose his source, it would be deemed established for purposes of this action that there was no such source. The trial court misconstrued the commissioner's order to include a ban on any mention of Hatfield whatsoever. Therefore, Ramirez was prevented from testifying not simply as to the existence of Hatfield's source, but also as to the existence of his own source, Larry Hatfield.

Article I, section 2, subdivision (b) of the California Constitution and Evidence Code section 1070 prohibit contempt proceedings against publishers, editors, reporters and others for failure to reveal their sources of information. Code of Civil Procedure section 2034 authorizes the court to impose reasonable sanctions

However, there is no logical nexus between respondents' charge that Lee was involved in another homicide, and the substance of Porter's allegations. Moreover, Ramirez testified that he did not know until the trial in this case that the bullets found in Fong's car were of the same caliber as the bullets used in the other homicide.

against one who refuses to provide discovery or respond to appropriate questions during deposition.

This case presents the interplay between (1) a reporter's right not to divulge a source, and (2) those provisions governing the redress of wilful failures to disclose information during civil discovery proceedings. However, this court need not resolve the tension between these laws here. The commissioner's order clearly did not bar Ramirez from explaining that *he* had relied upon his source, Hatfield. Nor would there have been any logical basis for such a sweeping ban on Ramirez's testimony. Hatfield was the disobedient deponent, not Ramirez. Hatfield's confidential source at the State Bar was the object of controversy, not Ramirez's source. Ramirez did not refuse to disclose his source nor did he attempt to introduce evidence of Hatfield's source. The trial court erred in disallowing Ramirez's testimony that he had a source for the published statements.

When the May 21st article is evaluated in light of Ramirez's actual state of mind, it is clear that as a result of the information he received from Hatfield, Ramirez had reason to and did believe that a State Bar committee had decided to sanction Merle. Although respondents were allowed to argue that Ramirez invented this story, it was in fact based on a trusted source. No actual malice existed.

In *New York Times*, the high court refused to hold the publisher liable even though the Times would have discovered the falsity of the published material had they simply checked their own news files. (376 U.S. at pp. 287-288 [11 L.Ed.2d at p. 711].) In that case, the court affirmed that freedom of expression requires " 'breathing space' "—room for error—if it is to survive. (*Id.*, at p. 272 [11 L.Ed.2d at p. 701], quoting *NAACP v. Button* (1963) 371 U.S. 415, 433 [9 L.Ed.2d 405, 418, 83 S.Ct. 328].)

The Supreme Court recently reaffirmed the fundamental precept that error is inevitable in free debate and that even demonstrably false statements must be protected absent actual malice. (*Philadelphia Newspapers, Inc. v. Hepps* (1986) — U.S. —, — [89 L.Ed.2d 783, 793-794, 106 S.Ct. 1558, 1564-1565]; see *New York Times*, *supra*, 376 U.S. at p. 272 [11 L.Ed.2d at pp. 701-

702]; Barron & Dienes, Handbook of Free Speech and Free Press, § 61.1, p. 226.) The critic of official conduct is not compelled "to guarantee the truth of all his factual assertions" for "to do so on pain of libel judgments virtually unlimited in amount" results in self-censorship. (*New York Times, supra*, 376 U.S. at p. 279 [11 L.Ed.2d at p. 706].)

In light of these settled principles of constitutional law, this court concludes that appellants did not harbor actual malice when they published the articles containing false allegations of official misconduct involving respondents.³⁴

V.

One additional issue that arose in the course of this trial must be addressed.

The jury was instructed in the modified language of BAJI No. 14.71 (6th ed. 1977) in pertinent part as follows: "If you find that plaintiffs suffered actual damages as a proximate result of the conduct of the defendants on which you base a finding of liability, you may then consider whether you should award additional damages against defendants, for the sake of example and by way of punishment. You may in your discretion award such additional damages, known as punitive or exemplary damages, if, but only if, you find by clear and convincing evidence that said defendants were guilty of oppression, fraud, or *actual malice in the conduct on which you base your finding of liability.*

" 'Malice' means a motive and willingness to vex, harass, annoy or injure another person. Malice may be shown by direct evidence of declaration of hatred or ill-will *or it may be inferred from acts and conduct, such as by showing that the defendant's conduct was wilfull [sic], intentional, and done in reckless disregard of its possible results.*" (Italics added.)

³⁴ Since this court holds that the evidence did not establish actual malice, it is not necessary to reach the issue whether appellants were absolutely privileged under Civil Code section 47, subdivision 4, or the numerous remaining evidentiary claims.

This instruction was apparently based on Civil Code section 3294,³⁵ which provides guidelines for the imposition of punitive damages in civil cases. The trial court refused to instruct in the language of section 48a, which governs the award of punitive damages in newspaper libel cases. Section 48a, subdivision 4(d), defines "actual malice" for purposes of punitive or exemplary damages, as "that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice."

In order to reach the issue of "actual malice" under section 48a for purposes of awarding punitive damages, the jury must first have found liability based on *New York Times* "actual malice." These two types of "actual malice" are very different.

The *New York Times* test "directs attention to the 'defendant's attitude toward the truth or falsity of the material published . . . [not] the defendant's attitude toward the plaintiff.'" (*Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 257.) Actual malice under *New York Times* "is quite different from the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages. . . . [C]ommon-law malice—frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights—would focus on the defendant's attitude toward the plaintiff[] . . . not toward the truth or falsity of the material published." (*Cantrell v. Forest City Publishing Co.* (1974) 419 U.S. 245, 252 [42 L.Ed.2d 419, 426-427, 95 S.Ct. 465].) "'[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard.' [Citations.]" (*Letter Carriers v. Austin*, *supra*, 418 U.S. at p. 281 [41 L.Ed.2d at p. 760].)

The punitive damage instruction in this case effectively dissolved the distinction between these two types of "actual malice." It did not require the jury to base its punitive damage award on a

³⁵ All statutory references are to the Civil Code unless otherwise noted.

finding that defendants bore "hatred or ill will toward the plaintiff."³⁶ The jury was informed that it could base its finding of malice either on direct evidence of such hatred or ill will, or on intentional conduct or reckless disregard for the results of that conduct.

By the reference to and juxtaposition of "intentional conduct" and "reckless disregard," the instruction given was strikingly similar to that which the jury received regarding the determination of liability based on *New York Times* actual malice.³⁷ Therefore, the jury may well have confused the two phrases and improperly based its award of punitive damages on its finding of *New York Times* actual malice.

The danger of confusion was compounded by the use of the word "conduct" in the first part of the punitive damage instruction. The jury was instructed that it could award punitive damages if it found by clear and convincing evidence that the defendants "were guilty of . . . actual malice in the conduct on which you base your finding of liability." The flaw in this sentence is apparent. If the jury found liability based on appellants' conduct in publishing the articles with *New York Times* actual malice, it was then free to award punitive damages based on that same conduct. Such a result would eliminate the sharp distinction between the actual malice required by *New York Times* and that necessary to award punitive damages under section 48a.

This instruction should not have been given. However, it is not necessary to reach the impact of this error in light of the court's

³⁶ Instead of tracking section 48a's definition of actual malice as "hatred or ill will toward the plaintiff," the instruction defined malice as a willingness and motivation to vex and harass which could be shown by direct evidence of hatred or ill will.

³⁷ The jury was instructed, in accordance with *New York Times*, that in order to find appellants liable, it had to find they published libelous statements about respondents, and that "at the time of the publication of said statements [appellants] knew the statements were false, or published or allowed the statements to be published with a reckless disregard of the truth or falsity."

finding that the record does not establish liability under *New York Times*.

VI.

In sum, this court holds under *New York Times* that the evidence does not establish with convincing clarity that appellants possessed actual malice when they wrote and published the disputed articles.

The judgment of the Court of Appeal is reversed with directions to reverse the judgment of the trial court.

Broussard, J., Reynoso, J., McClosky (Eugene), J.,* and Johnson (Earl) Jr., J.,* concurred.

Mosk, J., and Lucas, J., concurred in the judgment.

* Assigned by the Chairperson of the Judicial Council.

APPENDIX A

SAN FRANCISCO EXAMINER

Wednesday, May 19, 1976

How lies sent youth
to prison for murder

Curious conviction
in Chinatown trial

By Raul Ramirez

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On Nov. 1, 1972, Richard W. Lee, 19, was convicted of first-degree murder in what San Francisco authorities hailed as a major breakthrough in their attack on Chinese youth gangs.

Now, 3½ years later, an Examiner investigation has uncovered evidence that he was convicted on the basis of perjured and misleading testimony exacted by a prosecution that badly needed a conviction.

Lee is serving a life sentence at Deuel Vocational Institution in Tracy.

His conviction by a jury came after a series of widely publicized shootings that prompted then-Mayor Joseph Alioto to declare that the streets of Chinatown were nevertheless "the safest place in town for tourists and Caucasians." The mayor asked for immediate police action to make them safe for Chinese.

Lee's trial had unfolded in a city shaken by a succession of spectacular slayings among young Chinese and a degree of alarm echoed by the highest law-enforcement authorities in California. On the morning 12 jurors retired to decide Lee's fate, Bay Area newspapers quoted state Atty. Gen. Evelle Younger as telling a press conference in Sacramento:

"Chinese gangs are fast becoming serious threats in the state and other parts of the country in cities and towns having Chinese communities."

In San Francisco, where a string of more than a dozen killings spanning a two-year period had baffled police and frightened many in The City's growing Chinese community, a conviction

was viewed as a significant accomplishment. The guilty verdict in Richard Lee's trial was hailed as such in press reports.

The peculiar circumstances surrounding the Lee case, documented by the Examiner during a lengthy investigation, include:

- The testimony of a cellmate that Lee had confessed to the killing and boasted of his gang connections while awaiting trial. The cellmate, in a sworn statement obtained by the Examiner, says now that his testimony was fabricated by Lee's prosecutor. He says he was induced to testify under threats of violence and promises of leniency.

- The identification of Lee as the killer by a witness to the slaying. That witness, a 16-year-old girl, now swears she was never sure of the killer's identity but was rebuffed by prosecutors and police when she told them so. She says she agreed to testify against Lee only after being falsely assured that 11 other witnesses had also identified Lee. In fact, she and the cellmate were the two main pillars in the prosecution case.

- The assertion of another young witness, once a prime suspect in the slaying who was not prosecuted, that the killer was not Richard Lee.

(The San Francisco police homicide inspector who investigated Poole Yig Leong's killing declined to discuss the case. Pierre Merle, the prosecutor who obtained Lee's conviction, who is now employed by a New York investment firm, did not respond to several telephone requests to discuss the case with the Examiner.

Lee's conviction closed the file on the shooting death of Poole Leong, 22, a Hong Kong-born man who the state claimed was a key member of a gang at war with Lee and friends.

On June 13, 1972, Leong was standing outside a housing project apartment at 895 Pacific Ave. According to police reports and eyewitness testimony, Leong was shot while talking on a phone passed out of an apartment window at his request for an impromptu talk with a girlfriend.

Within hours after the shooting the discrepancies surrounding the Lee case began unfolding:

According to a police report prepared that night, "Suspect No. 1," the gunman, was a "Chinese male, 14-15 years, 5'3", skinny build, straight black collar-length hair." Richard Lee, a bank teller who was arrested 14 days later, was 19 years old at the time, 5'8", medium build. His hair was black and straight.

* * *

The prosecution version of what happened that summer night, and of the events leading to the shooting, was outlined during Lee's five-day trial before San Francisco Superior Court Judge Walter Calcagno four months later. The scenario was dramatic, yet simple:

Richard Lee, police intelligence officer Diarmuid Philpott testified, was a member of a gang of hoodlums headed by his close friend, Joe Fong. Fong's group and another youth gang, the Wah Chings (Young Chinese) were involved in a struggle for power and territory in which many had already died, Philpott told the jury.

The immediate motive for Leong's murder was described as retaliation for an attempted kidnapping of Fong's younger brother.

On the morning of the killing, Chung Way Fong, then 15, had been threatened by several youths affiliated with his brother's rivals, the Wah Chings. His assailants had approached him aboard a Muni bus headed for Marina Junior High School. They had shown him the handle of a gun protruding from someone's belt and asked for Joe Fong's whereabouts.

Then, they had pointed to a car driving in the opposite direction and told him it was Leong's. They ordered him to follow them off the bus and into the car. The young Fong eluded the youngsters as they left the bus. He told the bus driver, who reported the incident to Muni. The youth, later that morning, also reported the incident to school officials and police.

Prosecutor Pierre Merle theorized at Lee's trial that Leong's murder had been ordered after Chung Way Fong told his older brother of the incident early that evening.

* * *

Shortly after 10 p.m. that same night, Poole Leong strolled down Pacific Avenue and rapped on a ground floor window of apartment 31 at 895 Pacific, one of the buildings in the huge Ping Yuen federal public housing project.

A 16-year old girl came to the window and the two talked briefly. Leong then asked to speak with another girl and his friend dialed a number and handed him the telephone through the window. She walked back to join her younger sister and a neighbor. Her sister slept nearby on a living room couch.

The girl's 13-year old brother stepped out of the small apartment and joined Leong outside. The youngster sat on a wooden bench alongside the building while Leong stood next to the window, his back to a small patio area. The sunken patio was separated from the Pacific Avenue sidewalk by a hedge and wall. To reach the area, it was necessary to step down from a platform adjoining the sidewalk.

What happened next, at about 10:20 p.m. June 13, 1972, was described by the girl's brother:

Leong had been on the phone for about five minutes when "two guys came up from behind him and he turned around," the boy told homicide inspectors Frank McCoy and Edward Erdelatz two hours later.

The youngster identified one of the two, the one not carrying a gun, as Weyman Tso, then 16. Tso's grandparents lived across Pacific Avenue in another public housing project building. He had been involved in fights with the young witness and they knew each other well.

(In a statement obtained by the Examiner, Tso claims to have walked upon the shooting unaware of what was happening. Frightened, he went into hiding immediately after the incident and did not surface until he turned himself into police eight months later, after Lee's trial. He says Richard Lee, whom he knows well, was not the killer and that he did not recognize the gunman.)

In a taped interview with police, the girl's brother said he greeted Tso when the two youths walked up. He did not recognize the gunman, he said. Then, several shots rang out.

The youngster said he pulled his coat over his head as shots were fired. After the shooting was over he looked up and saw the two youths run away in the direction of another Ping Yuen project building, a highrise across Pacific Avenue. Several breezeways on that building's ground floor provide easy passage to Broadway's busy neon-lit strip.

At Central District police station on the fringes of Chinatown, the young witness later examined more than 100 pictures of youths whom police believed to be connected with gangs. Richard Lee's picture was among them. He did not pick it out. He did identify a picture of Tso.

* * *

When the shots were fired, the girl who had given Leong the phone thought they were firecrackers. Then she looked out the window and saw "two guys" standing outside for a split second. One held a gun in his right hand. She recognized the other one as Weyman Tso, a fact she promptly told police.

She told investigating officers McCoy and Erdelatz that she had taken "just one look" at the gunman, who looked like someone she had seen "a couple of years ago in Chinatown."

After a brief interview with the officers, she was asked to look at the photographs on file.

Her description of the gunman differed slightly from her brother's: She described him as a Chinese person in his early 20s, about 5 feet 6 inches tall—a "thin" man. Her brother described a man 5 feet 3, 14 to 15 years old. Police reports prepared that evening carried his description of the killer.

At 1:25 a.m. on June 14, three hours after Poole Leong was gunned down, her voice was recorded in still another talk with inspectors McCoy and Erdelatz.

Sounding tired and confused, she estimated the number of pictures she had looked at as about "6,000." The officers corrected her and she agreed that there were at least 100.

Softly, she said the man whose picture she had picked out was the man who had shot Poole Leong. It was Richard Lee.

For the next two weeks, Richard Lee reported to work as normal at the Civic Center Branch of the Wells Fargo Bank. Although a warrant for his arrest was issued on June 16, it was not until 11 days later, in the early morning hours of June 27, that he was arrested after a car in which he was a passenger was stopped for a traffic violation.

Two weeks later, on July 13, 1972, the girl testified at a preliminary hearing on the case. She seemed much less sure of the identity of the killer.

Asst. Dist. Atty. Martin Harband asked her about a police lineup the prior day, when she had identified Richard Lee as the man whose picture she had pointed out the evening of the murder.

Q. Did you pick someone out yesterday?

A. Yes.

Q. Who did you pick?

A. I say it looks like him.

At this hearing, the girl's uncertainty was clear. Unlike prosecutor Merle, Harband handled the preliminary hearing with no attempt to push her:

Q. . . . Did you pick Richard Lee yesterday?

A. I said it looks like him.

Q. It looks like who?

A. Richard Lee.

Q. O.K. Did you pick him out because he was the one you saw with the gun on June 13?

A. I said I am not sure.

Q. What are you sure about . . . ?

A. I already told you.

The Judge. Try to repeat.

A. Like I feel guilty if I put the wrong person in.

Q. . . . did you see the face of the man who was holding the gun?

A. No. Not exactly . . . It looks like the picture I picked out but then I say I'm not sure.

Harband explored the subject of fear, one that the prosecution was to return to time and again in seeking to explain the girl's reluctant testimony. She had told police the night of the murder that she was frightened. Harband asked her to explain, and she responded:

"That night, I don't know. Like that night I was scared and everything and I was nervous, so, like I said, that night I remember what, but like I say, after I thought it over it doesn't seem to me like the same person when I tried to imagine him. That is what I told you."

Fear would become the central thrust of the prosecution's case against Richard Lee. From the outset, it sought to portray Lee as an awe-inspiring gangster whose self-assurance came from knowing that fear would silence prospective witnesses.

Several attempts were made to impress the jury with this aura of fear during Lee's trial.

At one point, the girl was questioned about fears of retaliation. A point was made that, after the shooting, a police watch of her home had been instituted at her parents' request.

This police concern was odd. The department stationed a police car outside her home for several weeks, day and night. But police did not provide any further protection while she went to school and moved freely, alone, about Chinatown.

No explanation was ever given as to why she and her brother would hesitate to identify Richard Lee, who was incarcerated, and

not the other suspect, who was still at large and presumably in a better position to carry out any revenge plans.

In a recent interview, the girl described how she picked out Richard Lee's picture the night of the murder:

"I went through a number of them (pictures). Then there were a couple of pictures, I say, uh, it could be him, or it could be him . . . I told them, well I wanted to go home badly but they said that I have to wait until I picked someone. I felt that I can't leave that room unless I find someone. . . ."

After returning home in the early morning hours, she lay in bed, unable to sleep:

"I was thinking, trying to think of what happened. I think of that picture and the guy that I picked out and I keep thinking, I go, no, God, what am I doing? . . . That wasn't him I picked out. I didn't really get to look at the guy that did the shooting."

When, later, she told police of her second thoughts, she was rebuffed: "They asked me, is it because I got a phone call or someone threatened me or this and that and that is why I changed my mind . . . I told them no. I didn't get no phone call" she said.

The inspectors sought to reassure her, the girl says:

"They said that there were 11 other witnesses, and I thought that what I had to say wasn't that important because I was a minor and there are 11 other witnesses, so I thought it was so that they told me that . . . I think, oh well, if there are 11 other people, witnesses, it must be him. Then what I've got to say isn't important."

Noting that prosecutor Harband accepted her statements at the pre-trial hearing with no attempt at channeling her testimony, she added: "Then (later on) the second guy (Pierre) Merle, told me he was pretty rough. He was yelling at me . . . He was pretty mean . . . He got very angry at me and I became very frightened of him.

"What I think is that he was angry at me because I was changing my story," she said.

At the lineup, she said, she balked at picking out the shooting suspect because "I'm not even sure it's him."

"And they go, 'OK, pick up the guy in the picture.'

"Therefore when I looked at the people in the lineup I picked out Richard Lee because it was he that I recognized as being the person whose picture I had picked out. That was easy to do because the five other perons in the lineup all looked different from Richard Lee, who was the shortest of the group."

The Lee trial experience, and the discovery afterward that she had been misled, has embittered her, she says.

"I thought police are very helpful and nice... I try to be helpful to them... But later on I don't think they are nice any more... they lied to me. That's what I don't like. I thought police couldn't lie and everything. Then another thing is that for someone to want to talk to they were, they were pretty mean."

She asked the Examiner to withhold her name, because, she said, she is embarrassed about having helped convict Lee in such a way.

* * *

San Francisco attorney Roger Ruffin who recently agreed to represent Lee, is using the girl's statements and other information uncovered in the Examiner investigation and elsewhere, and is preparing a writ of habeas corpus he expects to file on Lee's behalf in a few days in an attempt to obtain judicial review of the young man's case.

Ruffin, a former Superior Court judge in San Diego, says his review of the Lee case indicates he was wrongfully convicted:

"In my view, Richard Lee was victim of community hysteria regarding Chinatown's so-called Chinese youth gangs," Ruffin said.

The week preceeding Richard Lee's trial, attorney Patrick Coyle, the young lawyer assigned by the firm of James Martin MacInnis to defend Richard Lee, retired to a family mountain cabin. He now recalls he "ate good food, didn't drink, just getting ready" for the trial, which he thought was still 10 days away.

Coyle felt confident that the trial would result in Lee's acquittal. The prosecution's case, as outlined to him in discovery proceedings, rested mainly on the girl, a reluctant witness whose identification of Richard Lee was weakened by her own concern about putting the wrong person in prison.

The rest of the case against Richard Lee, he felt, was based on innuendo and guilt-by-association testimony from police officials.

Coyle returned to San Francisco the weekend of Oct. 22. The trial, he thought, was still a week away, set for Oct. 30. On Oct. 24, he wandered into the Hall of Justice to check up on another case and found, to his surprise, that the case of the People vs. Richard Lee had been rescheduled—for that day.

A message telling him of the change had been telephoned to his office the prior Friday. Patrick Coyle had not been in his office.

Although thrown off balance by this change, Coyle remained confident.

But he did not know that a new character waited in the wings, where he had been secretly primed and kept by Asst. Dist. Atty. Merle and Inspectors McCoy and Erdelatz.

That character was a most unlikely one, a surprise witness whose testimony proved devastating to Lee's case.

TOMORROW: The trial.

The Examiner inquiry into the Richard Lee case was made with the collaboration of Lowell Bergman, a free-lance investigative reporter aided by a grant from the Fund for Investigative Journalism of Washington, D.C.

D.A. promises 'full cooperation'

San Francisco Dist. Atty. Joseph Freitas says he will "fully cooperate" in any attempt to determine "through the established process" whether Richard W. Lee was wrongfully convicted in a 1972 Chinatown murder case.

Freitas' statement came after San Francisco attorney Roger Ruffin, a former San Diego Superior court judge, said he would seek a court review of the Lee case.

The district attorney was briefed by The Examiner last week about the content of a series of stories about the Lee case beginning in today's editions of the paper.

The stories include allegations that a former assistant to then-Dist. Atty. John Ferdon pressured one witness into giving misleading testimony and fabricated the testimony of another.

Freitas said his staff is reviewing the contents of his office's files in the Lee case, but has found no irregularities. He acknowledged that it would be highly unlikely that anyone committing improper actions would allow them to be reflected in official files.

"We will fully cooperate with the court in determining what the truth is," he said. "This office has an interest in seeing that justice was or will be done in this case."

Freitas vowed he would take legal or administrative action against present or past members of his office or of the police department who his investigation shows acted improperly or illegally.

The Examiner stories include allegations from two key witnesses who say they were pressured by former prosecutor Pierre Merle and police to give misleading or false testimony.

Merle, now an investment firm's lawyer in New York, did not respond to repeated requests to discuss the case.

Frank McCoy, a police homicide inspector who handled the Lee case, declined to talk about it with the Examiner. He said the trial transcript should "reflect on the facts of the case."

"There is no reason to get together," he told a reporter. "The case went to a jury before a competent judge. The proper way of handling it is to take it to the district attorney's office."

McCoy, whom other law enforcement people described as a well-respected investigator, said he knew "where these things (allegations) are coming from—from his brother."

Lee's brother, William, had protested the conviction shortly after the 1972 trial.

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The Examiner stories, however, are based on an independent investigation and on interviews with witnesses and others close to the case.

Appendix B
San Francisco Examiner
Thursday, May 20, 1976
Chinatown murder:
Witness recants
By Raul Ramirez
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A surprise awaited Richard W. Lee on Oct. 24, 1972, when he went on trial in San Francisco on charges that he killed another young man in a Chinatown gang assassination.

Lee, a 19-year-old bank teller, was accused of shooting Poole Yig Leong, 22, in what police said was retaliation for an attempted kidnaping of a gang leader's brother.

Until his five-day trial began before Superior Court Judge Walter Calcagno, the case against Lee seemed hollow.

It consisted of testimony from policemen who said Lee was a member of a youth gang dubbed the "Joe Fong gang" and would have had reason to kill Leong, whom they identified as a member of the rival "Wah Ching gang."

The sole evidence linking Lee to the killing was the hesitant identification of him as the gunman by a teenaged girl who initially said the killer "looks like" Lee.

But in the trial's opening session, Asst. Dist. Atty. Pierre Merle revealed that he would have another witness—a man who had been quietly primed for months by him and police homicide inspectors.

That man's testimony was to be crucial in Lee's conviction of first-degree murder five days later.

He was Thomas Porter Jr., also known as John Henry, a young black man from the Midwest then facing a desperate legal situation of his own. He would testify that Lee had confessed to Leong's murder during intimate talks while the two shared a cell in the San Francisco County Jail.

Porter's testimony also was used to explain the absence of other substantive evidence and the reluctance of an eyewitness to identify Lee positively as the killer.

Testifying for several hours, Porter described Lee as a cocky gang hit-man unafraid of conviction because his gang would scare away witnesses.

Porter claimed to know Swahili and Cantonese. He boasted of his familiarity with Chinatowns in San Francisco and Chicago and of having gained Lee's confidence.

Porter is now serving time at a federal penitentiary for an auto theft conviction that preceded his San Francisco stint. He is no longer under the jurisdiction of the city's district attorney's office.

In a sworn statement obtained by the Examiner, Porter now repudiates his testimony at the Lee trial. He says it was fabricated by prosecutor Merle and that he agreed to perjure himself only after he was threatened by police.

Porter's statement, coupled with the assertion of the key prosecution "identification" witness—the teenaged girl—that her testimony was colored by false statements told her by police, puts in question the manner in which the People of California obtained Richard Lee's conviction.

Lee's trial was staged at a time when a long string of unresolved killings among Chinese youths received strident media coverage and was the focus of concern among city officials. Some worried that reports of violence would affect tourism.

Police were baffled and embarrassed by youth violence. First fights had inexorably escalated into premediated (sic) killings, and all police could do was cite nefarious codes of silence and describe the inability of white officers to penetrate the Chinese community.

Then came the evening of June 13, 1972.

Poole Yig Leong, an unemployed man who hung around with immigrant Chinese youngsters, was gunned down as he spoke on a telephone that had been passed out an apartment window at his request in a Chinatown housing project building at 895 Pacific St.

Of the three persons who saw the killer, only one, a 16-year-old girl, tentatively identified Lee as the gunman. The girl's brother claimed he had not seen the killer's face. A third witness, a young man once considered a prime suspect in the incident, after the trial turned himself into police and was released without being charged. He says Lee was not the killer.

The girl's identification was hesitant. She says she was never sure that Lee was indeed the man she saw with the gun that night, but that she picked out his picture from a police file because Lee "looked like him" and because she thought she would be required to pick out a photograph before being allowed to go home.

But police to whom the girl had confided the night of the murder that she feared Chinatown's "gangs," interpreted her hesitancy as fear of retaliation if she testified against Lee. They dismissed her protests that she wasn't sure whether Lee was the killer.

Later, when investigating officers learned that the 15-year-old brother of youth gang figure Joe Fong had been threatened by several Wah Ching toughs on a Muni bus the morning of Leong's murder, they concluded that they had found a motive for the slaying.

Police theorized that Leong was killed in retaliation for that incident. Lee's name fit into that scenario, for Chinatown police knew Richard Lee as a friend of Joe Fong.

Lee was arrested two weeks later when, late one night, a car driven by Fong was stopped for a traffic check. Although Lee had reported to work each day at the Civic Center branch of the Wells Fargo Bank, where he had worked for nearly a year, police had not located him until the morning of June 27, 1972.

Earlier that night, Chinatown youth worker Barry Fong Torres had been murdered in still another highly-publicized slaying. Police hinted—and San Francisco's newspapers dutifully reported—that Lee's arrest may have solved that murder. (The Fong Torres killing, however, remains unsolved.)

Richard Lee and Thomas Porter met shortly after Lee's arrest. The two became acquainted when Porter came to Lee's aid at the

San Francisco City Jail when a deranged prisoner seemed about to jump on the Chinese youth.

Porter was to testify later, that this incident spawned an unlikely friendship, which resulted in Lee confiding that he had killed Poole Leong, that he had played key roles in other Chinatown murders and that he was a member of a gang which would silence any prospective witnesses.

A few days after Lee and Porter met, Lee was transferred to the county jail one floor higher in the Hall of Justice complex at 850 Bryant St. He had been unable to post the \$100,000 bail set by Judge Claude Perasso at a preliminary hearing.

Porter, then 21, had been apprehended in San Bernardino with his girl friend shortly after commandeering a taxicab and its driver in San Francisco.

In and out of jail since he was 16, Porter faced four major felony charges; robbery, assault with a deadly weapon, kidnapping and manufacturing prohibited weapons for sale.

His situation was desperate. Far from his native Oklahoma, he was wanted by federal authorities for escaping from El Reno Federal Penitentiary there, where he had been serving a sentence for auto theft. A combination of the California and federal penalties could have put him away for life.

Then, he was assigned to the cell at the city jail with Richard Lee. A few weeks later, after Lee had been taken upstairs to the county jail, Porter joined him there—again in the same cell. The two shared a 10-by-12-foot living area with 10 other men through the summer and early fall of 1972.

During those months, Porter testified later, they became friends—the San Francisco-born young Chinese-American and the black man from Oklahoma.

As early as August, 1972, Porter had developed other acquaintances, whom he saw repeatedly. They were prosecutor Merle and homicide inspectors Frank McCoy and Edward Erdelatz. In a series of meetings in the Hall of Justice complex, they assembled the prosecutions's master stroke against Richard Lee.

Richard Lee was a shaken young man when he was ordered to stand trial for the murder of Poole Yig Leong. A July preliminary hearing had surprised him. He had expected to see the charges against him dropped because he believed his arrest to have resulted from mistaken identification or from what he viewed as routine police harassment of Chinese youths.

Shocked by the high bail, he became wary of everyone. Several of his cellmates testified that he was uncommunicative. Even his lawyer, Patrick Coyle, remembers him as "paranoid," reluctant to discuss any aspects of his life in the county jail's interview rooms because he believed he was the victim of a conspiracy.

It was this attitude that made Porter's testimony that much more incongruous to Coyle when it came to the trial.

Coyle scored a point or two by bringing other cellmates to the witness stand to testify about how Porter had told them they could get lenient sentences if they "cooperated" with prosecutors and helped police put together cases against others. None had heard Lee discuss his case with Porter or with anyone else.

(Lee says his stock answer whenever asked by his cellmates, including Porter, about the charges against him was, "That's what they say. That's what they say.")

Coyle's request at the trial that an interpreter be summoned to test Porter's purported fluency in Cantonese was denied by Judge Calcagno.

Porter's testimony was devastating. After befriending Lee, he said on the witness stand, the young man confessed to the murder, told him he had buried the murder gun and that members of his gang had dug it up after his arrest, broken it up into pieces and thrown it into "lakes" around San Francisco.

He testified that Lee had repeatedly boasted about his gang affiliations and the strength of their influence.

Porter told the jury he had voluntarily sought out police agents after Lee's disclosures. He declared he had not been threatened by anyone or offered leniency by police or prosecutors. To buttress his testimony, prosecutor Merle introduced as evidence a piece of

paper on which Lee had written the name of Joe Fong's brother, Kit Fong, and a telephone number.

Porter testified that Lee had given him Fong's name and number as a possible contact if he wanted to buy weapons when he left jail.

(Lee says Porter had asked him for the name of someone who could help him find a job if he got out of jail. Fong, then counselor at a San Francisco youth program, was a logical choice, he says.)

Porter's startling testimony overshadowed the uneasy, shaky identification by the teenaged girl. It even helped explain her hesitation.

Porter's declarations were augmented by the testimony of Terry Sullivan, the policeman who headed the Police Activities League's youth hall in Chinatown, and Sgt. Diarmuid Philpott, whom Merle introduced as an expert on Chinatown youth.

Philpott, a long-time Chinatown policeman who is now in the department's intelligence squad, testified that Lee was a "right hand" lieutenant of Joe Fong. He described Leong as a high ranking cohort of Wah Ching leaders.

Sullivan testified that he had once seen Lee at a gun firing range, where the officer had taken other Chinatown youngsters for target practice. Lee was holding a handgun, Sullivan testified. He did not say (and was not asked) that many Chinatown youths visited the gun range regularly as guests of police.

At 9:30 a.m. (Nov. 1, 1972) the seven women and five men who were to decide Richard Lee's guilt or innocence retired to deliberate. Six and a half hours later, their verdict was in: Guilty, first degree murder. Twenty-one days after that Lee was sentenced to life in prison.

The day after Lee's conviction, San Francisco's newspapers reported unnamed police officials hailed the jury's judgment as a breakthrough—the first conviction in a Chinatown youth gang warfare case.

TOMORROW: The "case" against Richard Lee breaks down.

APPENDIX C

San Francisco Examiner

Friday, May 21, 1976

juror's anguish:

He wept as he voted guilty

When he voted to convict Richard W. Lee of first-degree murder three and half years ago, Ivan Wright cried.

"It broke me up," he recalls now. "I cried like hell when I had to give this verdict."

His sorrow, Wright said, came from a nagging "emotional" doubt that Lee may not have been the man who killed Poole Yig Leong on the evening of June 13, 1972.

Lee was sentenced to life imprisonment for the killing, which police attributed to Chinatown youth gang warfare.

Wright, a retired hotel deskman and auditor, said he was bothered first by the testimony of a cellmate who claimed that Lee had confessed to the murder while awaiting trial.

"I knew that he was full of baloney," Wright said. "I don't think anybody paid attention to his testimony. He was in the slammer. He had reason to give a story."

Then, Wright added, there was the testimony from an eyewitness to Leong's killing, who hesitantly said that Lee was the man who shot Poole Leong.

"I had my doubts and a couple others (jurors) did," Wright said. "Neither attorney (defense or prosecution) ever said to that girl, 'Is the man who did the shooting in this courtroom right now?' I had mixed feelings, feelings that have always haunted me since then."

Wednesday, when Wright read an Examiner report of how both the cellmate and the young eyewitness, a 16-year-old girl at the time of the trial, now say they tailored their testimony to suit the prosecution because of pressure from authorities, he cried again.

"My conscience is killing me," he said in a telephone call to the Examiner.

"When we first went to deliberate, I wrote a question mark on the first ballot. That girl . . . I didn't exactly believe her . . . but when they read it back in the transcript (at his request) it sounded pretty good when written down. I had my emotional doubts. I'm even more heart-broken now," he said.

He said a majority of the jurors had been in favor of conviction from the outset, but he and a few others held out.

"I had a sixth sense that that wasn't right. She had answered so vaguely (when asked to identify Lee as the killer). And where do you separate reason from emotion?"

Finally, after several hours of debate, Wright agreed to a guilty verdict.

"I had to go along with the verdict finally," he said. "The instructions from the judge on reasonable doubt were to decide the case on the factual information. But it bothered me."

"I was sad, to come to a verdict like that. Had it been a capital case I couldn't have, I never would have voted for a conviction.

"That's why I am against capital punishment. God, if we ever make a mistake, how are we going to rectify it?" he asked.

The Examiner's report of how the two key witnesses admit to having given false or misleading testimony troubled him, Wright said.

"I'm all for law and order, but, my God, this is not law and order," he said.

"We might have law and order, but not by putting innocent people in jail," he said.

Chinatown Murder

How witness

was coerced

By Raul Ramirez

© 1976 San Francisco Examiner

"I falsely testified in The People v. Richard Lee."

With this opening, Thomas Porter Jr., the man whose testimony may have sealed the murder conviction of Richard W. Lee

three years ago, swears now that he lied to keep the young Chinese-American behind bars.

Porter, now a federal prisoner, claims he lied because of police threats against him and his girlfriend.

On Nov. 1, 1972, Richard Lee, then 19, a San Francisco bank teller, became the first person convicted of murder in a wave Chinatown youth gang killings.

Porter's admission that he lied as a witness, along with other information obtained by The Examiner during an investigation into the Lee case, indicates that the young man was convicted on the strength of misleading and perjured testimony.

Porter's testimony, which he now repudiates, was the cornerstone of an otherwise weak prosecution case: He testified that Lee had confessed to the murder while the two shared a cell in the San Francisco County Jail while awaiting their respective trials.

Porter's assertion the Lee had boasted of his gang connections and of how they would scare away witnesses helped explain the absence of other substantial witnesses. The jury apparently believed him.

Porter says now:

"The truth is that Richard Lee never told me any such thing, nor did he ever say anything to me or in my presence about any murder or any crime, other than to say what he was charged with by way of explaining why he was in jail," Porter declares in a sworn statement given from a federal penitentiary.

Several weeks after he met Lee at the San Francisco City Jail in July, 1972, Porter says, he was summoned by a robbery detail police officer to the department's homicide squad.

An escaper from a federal penitentiary at the time, Porter faced kidnaping, robbery and assault charges in connection with an abduction of a San Francisco taxicab driver.

The officer and others alluded to additional charges that could be filed against Porter, then talked about Richard Lee, Porter claims in his affidavit.

"They said they knew he was in the same tank as I was and that they had purposely had me and him put in the same tank because they wanted information from Lee," Porter says. "They said they wanted something to convict Lee of murdering a Chinaman . . ."

Lee was awaiting trial on charges that he had killed a 22-year-old Chinese man in retaliation for the attempted kidnaping of the brother of a gang boss.

After the initial meeting, Porter said, he was taken to several sessions with Pierre Merle, the assistant district attorney prosecuting Lee, and with police homicide inspectors.

"When I first met with Merle he gave me a written story that he told me to learn so that I can give it as testimony against Richard Lee," he said. "Mr. Merle had me recite the story for him over and over and he told me how I should testify. Mr. Merle always took the written story back from me at the end of the meetings.

"My lawyer, Cyril Weeks of the public defender's office, was never present for these meetings, but he knew of them." (Weeks, in a recent interview, said he remembered little about Porter's case, but recalled knowing that Porter held several meetings with police officials.)

Porter adds: "I agreed to give the false story that Pierre Merle gave me at Richard Lee's trial because of threats and promises made to me by Officer (police homicide inspector Frank) McCoy and his partner. They repeatedly promised me that if I gave the story prepared for me . . . I would not have to serve any time in California.

"They promised me that the woman I loved . . . who, pregnant, was being held in jail on the same charges . . . would be set free after a brief period of observation.

"When I refused to go along with the story that had been prepared for me to give as testimony . . . despite the promises . . . Officer McCoy and his partner, a blond man, 29-30 years old, of medium build, threatened me with bodily harm and death. McCoy and his partner took me on an elevator not far from

homicide and McCoy's partner drew his revolver and said that I would testify or my people would never see me again . . . McCoy's partner then hit me behind and below my ear, causing it to swell but leaving no mark.

"I did not agree to give the false testimony that had been made up for me against Richard Lee until my life was threatened . . ."

* * *

Former prosecutor Merle did not respond to telephone requests from The Examiner to discuss the Lee case. McCoy declined to discuss the case because, he said, it was decided by a jury "before a competent judge." He suggested that allegations of misconduct, if any, be taken to the district attorney's office.

Dis. Atty. Joseph Freitas, apprised of the content of Examiner stories concerning the case, said he would review his office files and promised to cooperate fully in a judicial review. San Francisco attorney Roger Ruffin, a former San Diego Superior Court judge who now represents Lee, says he will soon seek such a review.

* * *

Not long after Lee's conviction, Porter was convicted of armed robbery in San Francisco. He was sentenced to five years to life after authorities noted that he had cooperated in Lee's case. His term was to run concurrent with his federal sentences for auto theft and escape.

Porter's girlfriend was released on parole and later disappeared in violation of the terms of her release. She is now a fugitive.

Porter was later transferred to a federal penitentiary in the Midwest, where he is now imprisoned. But the Lee case remained in the back of his mind, he says, as a troublesome recollection.

Early last year, in the course of checking with the principals in the Lee case, The Examiner contacted Porter in prison. He welcomed this as his first opportunity since Lee's trial to tell the story behind his testimony.

Later, an attorney volunteered to take an affidavit from Porter. The above statements were quoted from that document.

* * *

Through the entire trial ordeal, Lee had protested that he was innocent. The night of the murder, he told The Examiner, he had eaten dinner at an apartment he shared with a friend in the Sunset District, then joined others to attend a friend's graduation from Opportunity High School at the Lowell High School auditorium.

After the ceremony, he says, he drove to a house in the Ingleside District into which he and friends were in the process of moving, watched the others play cards for a while, then retired to sleep.

In separate interviews, the youngsters whom Lee cited as his companions that night confirmed his account.

This alibi was never presented to the jury. Lee's attorney, Patrick Coyle, told The Examiner he had asked a friend of Lee to contact witnesses and ask them to get in touch with him but that this was never done. Coyle says he felt that the testimony of teenagers, many of whom had been labeled by police as gangsters, would have done little to sway the jury.

Lee's defense was hampered by another factor. Coyle did not find out about Porter's role as a witness until after the trial was under way.

The attorney protested to the judge that he did not have time to check Porter's background and reliability, but was turned down by the jurist when he sought a postponement.

* * *

In earlier reports, The Examiner detailed how the sole "identification" witness who testified that Lee was Leong's killer had sought to tell police that she was not sure that the gunman was indeed Lee.

That witness swears she was told by police that 11 other persons had identified Lee. Not until after the trial, she says, did she learn hers was the only "identification" of Lee as the killer.

The Examiner also has located another young man identified as being at the Ping Yuen public housing project when Leong was gunned down. That young man, once sought by police as an accomplice in the killing, says he walked upon the incident by chance. He affirms that the killer was not Richard Lee.

Still another law enforcement barrage against Richard Lee was delivered through senior probation officer Richard Silva.

Silva prepared a report recommending that Lee be sent to prison for the maximum term.

* * *

After being processed through California's prison intake system, Lee was assigned to Deuel Vocational Institution, the medium security prison in Tracy.

While appeals of his conviction prepared by volunteer lawyers have winded their way through the court maze, and have failed, Lee has quietly bided his time. He is currently enrolled in vocational training courses at the prison and works in the institution's warehouse as a stock clerk. Prison authorities described his conduct as excellent.

Pierre Merle, the man who led the effort to convict him, is now an investment firm's lawyer in New York City. He left a controversial prosecutorial career here.

(Months ago, a state Bar panel recommended that sanctions be taken against Merle for alleged misconduct involving a 1973 Chinatown case. A qualified state Bar source said that a disciplinary review committee has decided to impose unspecified disciplinary action against him. State Bar officials, for the record, said that there has been no official action taken concerning Merle.)

Says Lee, from the prison compound:

"The way I see it, they put me here according to their law of the land. I can't fight it because they've got me in a situation where if you fight it, they'll just get you more, lock you up, charge you . . .

"I have resigned myself right not to being here."

Despite a feeling that he was wronged by a legal system seeking scapegoats, Lee says he remains strong in spirit:

"They've got my body in here. Physically, they've got me but my mind is still free. As long as my mind can still function freely and think what I want to think and feel what I want to feel, it's OK. I'll make it."

Appendix D

AFFIDAVIT OF THOMAS HENRY PORTER, JR.

Thomas Henry Porter, Jr., upon his oath, attests:

1. At times I have used the alias John Henry.
2. I am a prisoner at the Terre Haute Federal Penitentiary Department of Prisons #36108-115, and I am serving a sentence of 0-6 years for interstate transportation of a stolen vehicle imposed by the Eastern District of Missouri. I am under a detainer from the State of California for a sentence of 5-life for armed robbery. I am under a sentence from the District of Kansas for 2 years for escape.
3. On October 30, 1972 I testified in the case of People v. Richard Lee being tried before Judge Ertola in Superior Court, San Francisco, California.
4. Some of my testimony in the trial of Richard Lee on October 30, 1972 was not true and I knew it was not true when I gave it. I gave false testimony in Richard Lee's trial because my life had been threatened by officers of the San Francisco Police Department while I was a prisoner in their custody and because promises were made to me by those officers and by the district attorney's office in San Francisco that in exchange for my false testimony against Richard Lee, I and the woman I loved would receive light treatment on the serious charges then pending against both the woman and myself, as I shall explain further in this affidavit.
5. I testified falsely in People v. Richard Lee that I spent my childhood in Chicago, that I lived on the Southside of Chicago, that I spent 2-3 years in the Chicago area, that I traveled from the Southside of Chicago to Chinatown there often to learn the art of self-defense, that I worked with a fellow who hauled trash in Chicago, that I stayed in Chicago for as long as 8-9 months, that I went from Kansas City to Chicago when I was 16 and have been going back and forth from Kansas City to Chicago, that I used to mow lawns and stuff in Chicago, and that I learned Swahili from people from the Virgin Islands in Chicago. The truth is that I have never been in Chicago in my life.

6. I testified falsely in *People v. Richard Lee* that I could speak Cantonese and that I can understand Cantonese. The truth is that I have never been able to speak or understand Cantonese.

7. I testified falsely in *People v. Richard Lee* that Richard Lee told me that he did not know if he was going to be convicted of anything; that he was not sure whether he would be convicted because he did not feel that a girl that the People were trying to get to testify would testify for the People because his gang members had talked to her and his people; that Richard Lee told me whether or not he had committed the murder with which he was charged; that I had other conversations about the murder with Richard Lee after we were bound over; that he was surprised that the girl testified; that he was surprised that the girl testified because of the threats issued to the girl and her family if she was to testify and that he would come back on appeal after and something would happen to her; that Richard Lee told me how he committed the crime; that Richard Lee told me that he was in Chinatown, around Pacific Street, that the guy was on the telephone, and that he killed this dude for the reason he had got in an argument with his gang members; that Richard Lee mentioned the guy on the telephone; that Richard Lee told me that he just shot the guy while he was talking on the telephone; that Richard Lee told me why he was the one who killed this man—because he was wishing there was more fellows in the gang, but he felt as though they were afraid and not qualified to pull the trigger, so that Richard Lee was appointed as the one to kill this man; that Richard Lee mentioned Kit Fong in reference to who appointed him. The truth is that Richard Lee never told as any such things, nor did he ever say anything to me or in my presence about any murder or any crime, other than to say what he was charged with by way of explaining why he was in jail. Richard Lee wrote Kit Fong's name on an envelope and he told me that I could reach him, Richard Lee, through Kit Fong, if I wished.

8. I falsely testified in *People v. Richard Lee* that Richard Lee had occasion to talk to me about any organization to which he belonged; that Richard Lee told me he was a member of the Ching Wah Yee Gang, that the gang extorted people up and down Chinatown, and that he could shoot a person in Chinatown;

that Richard Lee told me how this gang operated, what they did, and what they could do; that Richard Lee told me that he could pull the trigger and kill somebody in Chinatown and he would not get sent to the penitentiary for it because nobody would testify against him because of fear that something may happen. The truth is that Richard Lee never told me any such things and he never told me anything about any organization that he belonged to.

9. I falsely testified in People v. Richard Lee that Richard Lee had told me that a symbol in a newspaper picture of where he lived showed 2 people being arrested and that Richard Lee told me that one of the gang members lived in the house pictured or that Kit Fong lived there. What he told me was that the newspaper caption said that 2 people had been arrested there.

10. I falsely testified in People v. Richard Lee that Richard Lee told me what he did after he shot the man on Pacific Avenue on the telephone; that Richard Lee told me he buried the gun, went to his mother's house, and then went to make preparations for an attorney; that Richard Lee told him that since Richard Lee had been locked up some of his members disposed of the gun, dug it back up because it could have been seen where they buried it, and were supposed to have cut it up into different pieces and scattered it into one of these lakes; that Richard Lee had told him he had buried the gun where it could be seen. The truth is that Richard Lee never told me any such things and that he never had anything to say about his case to my knowledge.

11. I falsely testified in People v. Richard Lee that Richard Lee told me that he was not worried about his murder charge and that he felt the witness would not show up, and that Richard Lee told me that witnesses had been threatened. The truth is that Richard Lee never told me any such things and that he never talked about his case to my knowledge.

12. While I was in the county jail in San Francisco awaiting trial on charges of armed robbery, kidnapping, and possession of a sawed-off shotgun, approximately 3 months after I met Richard Lee in the city jail in San Francisco, I was forced to accompany Officer Casey of the robbery detail of the San Francisco Police

Department to homicide. Officer Casey told me they had another robbery charge. At homicide Officer Casey and another officer of the San Francisco Police Department whose name is unknown to me began talking about Richard Lee. They said they knew he was in the same tank as I was and that had purposely had said they wanted something to convict Lee of murdering a Chinese man whose name is unknown to me. They said Richard Lee had killed the Chinese man in a telephone booth down on Powell or Pacific Street in San Francisco. They told me the date on which the man was killed, which I cannot remember, and they told me that a gun of an unspecified type had been used to kill him. They said the gun had not been found and that it had been taken from the scene of the crime and broken into pieces into deep water. They told me to say that Richard Lee had told me he could kill anyone in Chinatown without worrying, and they told me to say that I could speak Cantonese, as I could not. At this time Richard Lee had not told me that he had killed anyone and he had not confessed any crime to me. In fact, Richard Lee would never talk about anything important and he would not talk about his case.

13. After the meeting with Officer Casey and the other officer at homicide I was forced to meet repeatedly, perhaps 30 times, with Pierre Merle of the district attorney's office, by officers of the San Francisco Police Department. When I first met with Merle he gave me a written story that he told me to learn so that I could give it as testimony against Richard Lee. Mr. Merle had me recite the story for him over and over and he told me how I should testify. Mr. Merle always took the written story back from me at the end of our meetings. The meetings took place at homicide until I was transferred from the county jail in San Francisco to different outlying jails in the 6 weeks before Richard Lee's trial. Sometimes Officer McCoy of the homicide detail of the San Francisco Police Department or his partner, whose name is unknown to me, or both of them, would be present at my meetings with Mr. Merle. My lawyer, Cyril Weeks of the Public Defender's Office, was never present for these meetings, but he knew of them. As Richard Lee's trial neared, my recital of the written story given me by Pierre Merle was tape recorded to make sure that I knew it and could deliver it the way Mr. Merle wished.

15. I agreed to give the false story that Pierre Merle gave me at Richard Lee's trial because of threats and promises made to me by Officer McCoy and his partner. They repeatedly promised me that if I gave the story prepared for me at Richard Lee's trial I would not have to serve any time in California on the would not detain me when I had completed my federal sentences from which I had fled. They promised me that the woman I loved, Sybil Kenney, who had been arrested with me and who, pregnant, was being held in jail on the same charges as had been laid against me, would be set free after a brief period of observation and would not have to serve any time. When I refused to go along with the story that had been prepared for me to give as testimony against Richard Lee despite the promises that things would be much easier for me and Sybil Kenney, Officer McCoy and his partner, a blond man, 29-30 years old, of medium build, threatened me with bodily harm and death. McCoy and his partner took me on an elevator not far from homicide and McCoy's partner drew his revolver and said that I would testify or my people would never see me again, that it was election time and they needed a conviction. McCoy's partner then hit me behind and below my ear, causing it to swell but leaving no mark. At the same time McCoy's partner kicked me in the tail, which has a cyst on it, causing it to swell and bleed, and afterwards I could hardly walk for 2-3 days. I was treated for the kick at the county jail hospital. During this same time I became aware that Sybil Kenney was being abused in jail, as by being thrown in the hole when she was pregnant.

16. I was promised by Officer McCoy and by Pierre Merle that I would serve no time in California on state charges and that I would be given a float out of California and would not have to come back there. Pierre Merle said that he had talked to people in Sacramento and that I would not have to come back to California. I received a letter from my public defender, Cyril Weeks, telling me that he been present with Pierre Merle, Officer McCoy, and McCoy's partner when Pierre Merle had called Sacramento. Officer McCoy promised me enough money to make Sybil Kenney's bond, which I believe was \$35,000.

17. I did not agree to give the false testimony that had been made up for me against Richard Lee until my life was threatened by Officer McCoy and his partner.

18. I was threatened by Pierre Merle with charges of robberies that he knew I had not committed.

19. When I testified against Richard Lee on October 30, 1972, I had no trust in the law, and I believe to this day that if I had not testified, falsely against Richard Lee as I was told by the police officers and the prosecutor to testify, I would not be alive today.

20. On the day I testified against Richard Lee, October 30, 1972, before I testified, I was told by my public defender, Cyril Weeks, that no detainer would be placed on me by California.

21. I met with Pierre Merle on the day I testified against Richard Lee, October 30, 1972, for 2-3 hours. Just after I testified I met with Pierre Merle at homicide in the presence of Officer McCoy and his partner, when Pierre Merle told me that I had forgotten to testify that Richard Lee considered himself extremely dangerous and hoped to be head of the Wah Chang Gang, and that if he did he would control Chinatown. Pierre Merle told me that I had testified well.

22. About a week after I testified against Richard Lee. I and Sybil Kenney were tried and convicted in Superior Court, San Francisco, I of first degree robbery and she of second degree robbery. I was sentenced to 5-life to run concurrent with the federal sentences I have mentioned, and Sybil Kenney was sentenced to 1-life. Sybil Kenney was not released after brief observation. Thus some of the promises that were made to me by the People in exchange for my false testimony against Richard Lee were kept. The detainer from California still hangs over me.

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So I betroth.

Date: 7-23-75.

THOMAS HENRY PORTER, JR.
THOMAS HENRY PORTER, JR.

Thomas Henry Porter, Jr. subscribed the foregoing affidavit of 6 pages after reading each page and making any corrections he desired and after signing each page in the margin and initialing each correction, before me at Terre Haute Federal Penitentiary, in the State of Indiana, on July 23, 1975.

ALICE M. MANNING,
Notary Public, Indiana
My Commission Expires
January 13, 1979

Appendix B

[174 Cal.App.3d 892]

[No. A011833. First Dist., Div. Five. Oct. 23, 1985.]

[As modified Nov. 22, 1985.]

Frank McCoy et al.,
Plaintiffs and Respondents,

vs.

Hearst Corporation et al.,
Defendants and Appellants.

OPINION

HANING, J.—Defendants/appellants Hearst Corporation, publisher of the San Francisco Examiner (together, Examiner), and its reporters Raul Ramirez and Lowell Bergman (collectively appellants) appeal from a libel judgment against them in favor of San Francisco Police Officers Frank McCoy and Edward Erdelatz and former Deputy District Attorney Pierre Merle (collectively respondents). Each respondent was awarded \$500,000 compensatory damages and \$500,000 punitive damages against the Examiner, and \$250,000 compensatory and \$10,000 punitive damages against Ramirez and Bergman each.

The judgment was based on a series of articles published in the Examiner under the byline of Ramirez, assisted by Bergman.¹ In substance, the articles charged respondents with intimidating and threatening witnesses and subornation of perjury in the criminal trial of People v. Richard Lee. Lee was convicted in San Francisco in 1972 of the first degree murder of Poole Leong, a Chinese youth, allegedly because of ongoing disputes between rival youth gangs in San Francisco's Chinatown district.

The key prosecution witness in Lee's trial was Thomas Henry Porter, a convicted felon and Lee's former cellmate. Porter testified that Lee admitted Leong's murder to him when the two of them were in jail together awaiting their separate, unrelated

¹ The articles are appended hereto in chronological order as appendices A through C, inclusive.

trials. The published articles charged that Porter's testimony during Lee's trial was false, that respondents knew it to be false and that respondents engaged in threats, physical coercion and bribery to force Porter into testifying falsely in order to obtain Lee's conviction.

Approximately two years after the trial Lee's brother approached Bergman, a freelance reporter, about investigating the events surrounding the case. Bergman became interested and during the course of his investigation located Porter in a federal prison in Indiana. He wrote Porter and advised him he was a "journalist and researcher investigating the murder trial of Richard Lee." He also stated: "In addition, I am interested in your own history and present status." He asked Porter to call him collect.

Porter responded by telephoning Bergman and the two arranged for Bergman to visit Porter in prison. Bergman thereafter met with Porter in January 1975. The substance of their conversation and the manner in which a statement was obtained from Porter forms the basis for the judgment below. Respondents claimed that Bergman persuaded Porter to sign a false affidavit wherein Porter stated that his testimony during the Lee trial was false, was induced by beatings and threats to his life by McCoy and Erdelatz, by promises from respondents of leniency for his girlfriend who was also facing charges at that time, and a concurrent sentence on his own charges. Porter also swore in the affidavit that Merle prepared a written script of his false testimony which he was required to memorize and relate to the jury. Respondents further claimed that Porter's affidavit was obtained through promises by Bergman to have a California detainer on Porter removed.²

In April 1975, Bergman persuaded the Examiner to publish a story about the Lee case and the roles of Porter, Merle, McCoy

² A detainer is a hold placed on a prisoner serving a sentence in another state or in a federal prison, for the purpose of securing the prisoner's return to the detaining state upon his release. In this case Porter was being detained to serve an additional sentence imposed by California.

and Erdelatz therein. Ramirez, an Examiner staff reporter, was assigned to write the story and Bergman was to have exclusive responsibility for obtaining Porter's version of the facts. Bergman obtained an attorney in Indiana, John Manning, to visit Porter and secure a signed affidavit in which Porter related the defamatory allegations.

The articles were published in the Examiner on May 19, 20 and 21, 1976. In addition to the charges that respondents conspired to suborn perjury, the articles also stated erroneously that Merle had been disciplined by the State Bar in connection with a separate matter. Respondents demanded a retraction pursuant to Civil Code section 48a,³ but received no response.

After Lee's petition for habeas corpus was filed seeking relief on the basis of Porter's affidavit, the People obtained a second affidavit from Porter in which he recanted his initial affidavit for Bergman and reaffirmed his testimony given during the Lee trial. He admitted he signed the initial false affidavit at Bergman's

³ Civil Code section 48a states, in relevant part: "1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous. [¶] 2. If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast. . . ."

request in exchange for Bergman's help in removing the hold imposed by his California detainer.

The relationship between Bergman and Porter and appellants' numerous contentions of error are discussed hereafter as they relate to the issue under discussion.

I

In the leading case of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412], the United States Supreme Court held that First Amendment principles require that public officials suing for libel must, as a prerequisite to recovery, establish by clear and convincing evidence that the defamatory publication is false and that it was published with "actual malice," which the high court defined as knowledge that the statement was false, or reckless disregard to whether it was false or not. (*Id.*, at pp. 279-280 [11 L.Ed.2d at p. 706].) Respondents concede their status as public officials within the *New York Times* rule. (See, e.g., *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 352 [41 L.Ed.2d 789, 812, 94 S.Ct. 2997]; *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 933 [186 Cal.Rptr. 605].)

New York Times also required appellate courts in such cases to "make an independent examination of the whole record" to assure "that the judgment does not constitute a forbidden intrusion on the field of free expression." (*New York Times Co. v. Sullivan, supra*, 376 U.S. at p. 285 [11 L.Ed.2d at p. 709]; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, [80 L.Ed.2d 502, 515, 104 S.Ct. 1949, 1958]; *St. Amant v. Thompson* (1968) 390 U.S. 727, 732-733 [20 L.Ed.2d 262, 268, 88 S.Ct. 1323]; *Belli v. Curtis Pub. Co.* (1972) 25 Cal.App.3d 384, 389 [102 Cal.Rptr. 122].) "[T]he rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'" (*New York Times Co. v. Sullivan, supra*, 376 U.S. at p. 285 [11 L.Ed.2d at p. 709].)

"The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law." (*Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, 466 U.S. at p. [80 L.Ed.2d at p. 523, 104 S.Ct. at p. 1965].) After reviewing the many cases in which it had been applied, the *Bose* court provided the clearest statement of the rule: "In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." (*Id.*, 466 U.S. at p. [80 L.Ed.2d at p. 519, 104 S.Ct. at p. 1962]; see also *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 11 [26 L.Ed.2d 6, 13, 90 S.Ct. 1537].) This does not mean, contrary to appellants' view, that we are to disregard the jury's findings concerning credibility of witnesses or permissive inferences which it might draw. Appellate courts are ill equipped to do so. The inflection or tone of voice, the emphasis of expression, the hesitant answer and the general attitude and demeanor of the witness are unavailable to us from the printed record. Our function on review is to "examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice. Once this question has been resolved in the plaintiff's favor, the jury's findings as to those inferences and as to witness credibility are determinative." (*Alioto v. Cowles Communications, Inc.* (9th Cir. 1975) 519 F.2d 777, 780; *Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, 466 U.S. at pp. [80 L.Ed.2d at pp. 511, 516, 104 S.Ct. at pp. 1955, 1959]; *Time, Inc. v. Hill* (1967) 385 U.S. 374, 394 [17 L.Ed.2d 456, 470, 87 S.Ct. 534]; *Bindrim v. Mitchell* (1979) 92 Cal.App.3d 61, 72 [155 Cal.Rptr. 29]; *Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 433 [142 Cal.Rptr. 304].) "[I]t is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood." (*Time, Inc. v. Hill*, *supra*, 385 U.S. at p. 394, fn. 11 [17 L.Ed.2d at p. 470].)

II

Under these guidelines we dispose initially with some preliminary issues. First, we emphasize that we are not dealing with the right of the press to report, criticize or otherwise comment upon the conduct or behavior of public officials. That right is properly and firmly protected by the First Amendment. In *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at page 270 [11 L.Ed.2d at page 701], the high court declared a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (See also *Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75 [13 L.Ed.2d 125, 133, 85 S.Ct. 209], criticized on other grounds, 388 U.S. 130, 134 [18 L.Ed.2d 1094, 1099, 87 S.Ct. 1975]; *Okun v. Superior Court* (1981) 29 Cal.3d 442, 451 [175 Cal.Rptr. 157, 629 P.2d 1369]; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 604 [131 Cal.Rptr. 641, 552 P.2d 425].) We are dealing instead with the false publication, as a fact, that two police officers and a deputy district attorney conspired to and did suborn perjury in a criminal prosecution in order to convict an innocent person. In fact, we are confronted with clear and convincing evidence to support a finding that the false charges were fabricated by one of the appellants herein.

Second, libelous speech is not protected by the First Amendment. (*Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, 466 U.S. at p. [80 L.Ed.2d at p. 519, 104 S.Ct. at p. 1961]; *Herbert v. Lando* (1979) 441 U.S. 153, 172 [60 L.Ed.2d 115, 131, 99 S.Ct. 1635]; *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at p. 340 [41 L.Ed.2d at p. 805]; *Time v. Hill*, *supra*, 385 U.S. at pp. 389-390 [17 L.Ed.2d at p. 468]; *Garrison v. Louisiana*, *supra*, 379 U.S. at p. 75 [13 L.Ed.2d at p. 133].) "Libel is a false and unprivileged publication . . . which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) The publications at issue accused respondents of subornation of perjury, a serious crime involving moral turpitude. (Pen. Code, § 127.) "The charge of commission

of some kind of crime is obviously libel per se.” (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 281, p. 2550; *Gregory v. McDonnell Douglas Corp.*, *supra*, 17 Cal.3d at p. 604; *Cianci v. New Times Pub. Co.* (2d Cir. 1980) 639 F.2d 54, 63-64.) “[T]here is no constitutional value in false statements of fact.” (*Gertz v. Robert Welch, Inc.*, *supra*, at p. 340 [41 L.Ed.2d at p. 805].) “Accusations of criminal activity, *even in the form of opinion*, are not constitutionally protected. . . . While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, *in whatever form*, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior. *Gregory v. McDonnell Douglas Corp.* [17 Cal.3d 596, 604 . . .].” (*Cianci v. New Times Pub. Co.*, *supra*, at p. 63, citing *Rinaldi v. Holt, Rinehart & Winston, Inc.* (1977) 42 N.Y.2d 369, 382 [397 N.Y.S. 2d 943, 366 N.E.2d 1299], italics in original.) Respondents were accused of suborning perjury of a critical witness through threats, beatings and bribery to obtain the murder conviction of an innocent person. It is difficult to imagine an accusation more damaging to the integrity and careers of attorneys and police officers.⁴ (See *Moranville v. Aletto* (1957) 153 Cal.App.2d 667, 672 [315 P.2d 91].)

⁴ On appeal, appellants do not suggest that the publications are not damaging to respondents’ reputations. However, they were inconsistent in their position below. Both Bergman and Reginald Murphy, editor and publisher of the Examiner, testified that in their opinion the articles did not defame nor damage respondents. Ramirez admitted that the publications were damaging. William Burkhardt, the city editor, testified he recognized the libelous nature of the articles and for that reason had them reviewed by the managing editor and the Examiner’s attorneys prior to publication. The record does not contain the attorneys’ response. Bergman has a B.A. degree, three years of graduate study and at the time of trial had ten years experience as a journalist; his testimony that he did not recognize the damaging and destructive nature of the articles is extraordinary.

III

Appellants contend the publications are privileged under Civil Code section 47, subdivision 4, which establishes a privilege for all "fair and true" reports of judicial proceedings or "anything said in the course thereof." They claim the publications were related to Richard Lee's pending petition for writ of habeas corpus, and that the trial court erred by failing to instruct the jury regarding the possible application of the privilege.

The existence of a privileged occasion is a question of law for determination by the court, while fairness is a factual question for the jury. (*Handelsman v. San Francisco Chronicle* (1970) 11 Cal.App.3d 381 [90 Cal.Rptr. 188]; *Williams v. Daily Review, Inc.* (1965) 236 Cal.App.2d 405, 418-419 [46 Cal.Rptr. 135].) Generally, a report is fair and true if "' . . . the substance, the gist, the sting of the libelous charge be justified, and if the gist of the charge be established by the evidence the defendant has made his case [for fairness and truth].'" (*Hayward v. Watsonville Register-Pajaronian and Sun* (1968) 265 Cal.App.2d 255, 262 [71 Cal.Rptr. 295], citing *Kurata v. Los Angeles News Pub. Co.* (1935) 4 Cal.App.2d 224, 227-228 [40 P.2d 520].)

California takes "a comparatively broad view" of the term "judicial proceeding" in Civil Code section 47 (*Glenn v. Gibson* (1946) 75 Cal.App.2d 649, 660 [171 P.2d 118]; *Albertson v. Raboff* (1956) 46 Cal.2d 375, 380-381 [295 P.2d 405]; *Hayward v. Watsonville Register-Pajaronian and Sun*, *supra*, 265 Cal.App.2d at 260; see also *Kurata v. Los Angeles News Pub. Co.*, *supra*, 4 Cal.App.2d 224), and has extended it not only to statements made during trial, but to proceedings taken preliminary thereto. (*Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577 [131 Cal.Rptr. 592]; *Larmour v. Campanale* (1979) 96 Cal.App.3d 566, 568-569 [158 Cal.Rptr. 143]; *Izzi v. Rellas* (1980) 104 Cal.App.3d 254, 261, 264 [163 Cal.Rptr. 689].) Thus, the privilege of Civil Code section 47, subdivision 4, extends at least to fair and true reports of proceedings preliminary to litigation which are themselves privileged as to the parties to the proceedings. (*Handelsman v. San Francisco Chronicle*, *supra*, 11 Cal.App.3d 381.)

However, the privilege is not without its limitations. In order to invoke its protection, the alleged defamatory matter must, in the case of litigants, be made within a judicial proceeding, have some connection or logical relation to the proceeding and be made "*in furtherance of the litigation and to promote the interests of justice.*" (*Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818, 825, 826 [106 Cal.Rptr. 718], italics in original.) "[I]t is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage' but rather 'assumes responsibility for the underlying accusations.'" (*Cianci v. New Times Pub. Co.*, *supra*, 639 F.2d at p. 68, quoting *Edwards v. National Audubon Society* (2d Cir. 1977) 556 F.2d 113, 120.)

The Examiner took the position that the articles were developed as a project of "investigative reporting . . . aided by a grant from the Fund for Investigation Journalism of Washington, D.C." The decision to investigate and publish occurred long in advance of the initiation or conception of Lee's habeas corpus proceeding. The Examiner announced in its first article that its stories were "based on an independent investigation and on interviews with witnesses and others close to the case." It was the Examiner, through Bergman, who persuaded Porter to provide the affidavit, under questioned circumstances which we describe, *infra*. The Examiner admitted this when its editor was questioned: "[Q.] Well, Mr. Murphy, it was your paper that got all of these—or got this affidavit; wasn't it? [A.] Yes, sir. [Q.] And it was your paper that started all these proceedings, wasn't it? [A.] Yes." In addition, the Examiner paid the expenses of John Manning, the Indiana attorney who obtained Porter's signature to the affidavit; it arranged for an attorney to represent May Tom, a witness at the Lee trial whom appellants wanted to testify in connection with the habeas corpus proceeding, and it obtained the attorney representing Lee in the habeas corpus proceeding. It also published an editorial which its editor, Mr. Murphy, claimed *was designed to*

influence the courts to review the Lee case through the habeas corpus proceeding.⁵

The questioned articles were written not as a report of any judicial proceeding, but rather as an expose of police and district attorney corruption which the Examiner claimed to have uncovered *through its own independent investigation*, as it repeatedly reminded the reader. The writers and publisher were espousing and concurring in the charges made by Porter with the preconceived view that they were true, which is graphically illustrated not only by the articles themselves, but in the testimony of appellant Ramirez, under whose by-line the stories appeared: "[Q.] Was it your intention when you wrote these articles, May 19, 20, 21, to convey to the reading public that Richard Lee had been framed up by the police department? [A.] If you want a yes or no answer, I will say yes." Bergman testified that before he collaborated on the articles, he felt that respondents were "involved in a perversion and a corruption of the criminal justice system."

Bergman also wrote to Porter and told him he would not assist him in removing the California detainer until he had Porter's signed affidavit. The relevant portions of that letter state: "I can't make promises or go to bat for you in a full scale way until Manning [the Indiana attorney retained to obtain Porter's affidavit] finishes otherwise it will all get very complicated. I thought we had a clear understanding there." Bergman admitted he told Porter that Porter would have to "go further" than merely talk to Bergman if he wanted Bergman to become his "friend," and that any help to be forthcoming "would depend upon what's happening when we talked." Bergman's own notes say that Porter understands that "actions are what count" and until then Bergman would not help in removing the California detainer.

Thus, it is clear that the initial Porter affidavit came into being only as a result of the actions and conduct of the Examiner and its agents. The privilege was not designed to shield from liability those who create and file false or libelous charges with the courts

⁵ The editorial in question was published three days after receiving the demands for retraction.

in order to legitimize their subsequent publication. (See, e.g., *Bradley v. Hartford Acc. & Indem. Co.*, *supra*, 30 Cal.App.3d at pp. 825-827.)⁶

Given their verdict, the jury necessarily found the publications to be false. It also found that appellants either knew them to be false or published with reckless disregard of their falsity. Consequently, the issue of "fairness" becomes irrelevant, since Civil Code section 47, subdivision 4, requires that the report be both "fair and true" to be privileged. Moreover, if fairness is considered, the finding that respondents published with knowing or reckless disregard of falsehood negates the element of fairness. Appellants' contention that the publications are privileged because they truthfully reported what was contained in the Porter affidavit cannot be sustained, since they created that affidavit. To allow them such protection would permit the sort of "bootleg" approach condemned by the *Bradley* court.

IV

We also conclude that sufficient clear and convincing evidence exists to support a finding of actual malice which, as we previously noted, is defined as knowledge that the published statement was false, or publication with reckless disregard of whether it was false or not. The existence of actual malice involves the determination of the publisher's state of mind and is a factual question for the jury. (*Time, Inc. v. Hill*, *supra*, 385 U.S. at p. 394 [17 L.Ed.2d at pp. 470-471]; *Alioto v. Cowles Communications, Inc.*, *supra*, 519 F.2d at p. 780; *Reader's Digest Assn. v. Superior Court*

⁶ We do not imply that investigative journalism should be curtailed nor in any manner discouraged. To the contrary, a free press may be society's only effective watchdog over governmental conduct and other activities affecting the public interest. (See, e.g., *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at pp. 270-271 [11 L.Ed.2d at p. 701]; Douglas, *The Right of the People* (Arena ed. 1972).) However, a clear and necessary distinction exists between the discovery of news and its creation. The jury obviously determined that the "facts" in the initial Porter affidavit were *created*, rather than *discovered* through legitimate investigation.

(1984) 37 Cal.3d 244, 258 [208 Cal.Rptr. 137, 690 P.2d 610]; *Widener v. Pacific Gas & Electric Co.*, *supra*, 75 Cal.App.3d at p. 433. Actual malice may be established by either direct or circumstantial evidence. (*St. Amant v. Thompson*, *supra*, 390 U.S. 727; *Herbert v. Lando*, *supra*, 441 U.S. at p. 164, fn. 12 [60 L.Ed.2d at pp. 126-127]; *Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at pp. 257-258.) Our conclusion that a finding of actual malice is supported by clear and convincing evidence in the instant case includes both the elements of knowledge and of reckless disregard.

Actual knowledge needs no definition and, in the context of this record, finds its support in the trial testimony of Porter. Porter testified he told Bergman that his testimony in the Lee case was true, but that Bergman was not satisfied with that statement and told him he could not affect the removal of the California detainer unless Porter changed his story. He said Bergman told him the San Francisco police were known for threatening witnesses into giving perjured testimony. Porter further stated that Bergman suggested to him what he should say in recanting his Lee trial testimony. This constitutes direct evidence of actual knowledge, at least as to Bergman.

Reckless disregard "cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. . . . [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. . . . [¶] The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where

a story is fabricated by the defendant [or] is the product of his imagination. . . . Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (*St. Amant v. Thompson, supra*, 390 U.S. at pp. 730-732 [20 L.Ed.2d at pp. 266-267].)

A review of some of the factors which could reasonably be expected to affect the veracity of the informant, the accuracy of his report and appellants' state of mind supports respondents' position that the finding of actual malice is based upon clear and convincing evidence:

(1) Porter was desperate to have the California detainer removed; he did not want to return to California to serve additional time when his federal sentence was up. He was concerned about the treatment he might receive in a California prison as an informant.

(2) Bergman repeatedly told Porter he would help him with the California detainer only in exchange for Porter's cooperation. In his letters to Porter he advised him that Porter's attorneys were not doing anything for him, but that Bergman had a friend "[r]ight smack in the middle of the Governor's office" who would assist in removing the California detainer. As mentioned above, Bergman told Porter he would not help him until Porter produced the affidavit repudiating his Lee trial testimony.

(3) John Manning, the attorney who interviewed Porter and obtained his affidavit had serious reservations about Porter's testimony, which he conveyed to Bergman. Witness the following testimony from Manning during the trial below: "[Q.] When you left Porter after your second meeting, had you formed any opinion as to his veracity at that time? [A.] Oh, sure. [Q.] What was your opinion then? [A.] My opinion and my opinion now is that Porter would say or do anything to improve his position behind bars. [Q.] Would it also be correct that you had some doubt in your own mind as

to the truth of the matters in there? [A.] Yes. [Q.] All right. [A.] I will tell you the reason: Because I was not able to pin him down on some details that in my own mind I felt I should have been able to pin him down on if he was telling me the truth. [Q.] Did you ever convey that doubt to Mr. Bergman? [A.] Yes."

(4) Appellant Ramirez had been advised by one of his colleagues on the Examiner, by the attorney for Richard Lee and by his city editor that Erdelatz and McCoy were considered to be good police officers. Both Ramirez and the city editor, William Burkhardt, knew that the publication of the articles would seriously damage respondents' reputations. Burkhardt recognized the libelous nature of the articles and sent them on to the managing editor and the Examiner's attorneys for review and comment prior to publication.

(5) Appellants had Porter's statement for nearly one and one-half years and his affidavit for nearly a year before the articles in question were published. During that period they conducted an investigation, including a fruitless search for three specific witnesses whom Porter said he told about respondents' alleged misconduct.⁷ Porter also stated that the injuries he received as a result of the beatings from the officers required treatment while he was in jail in San Francisco. No medical records could be located to verify this statement. In total, appellants were unable to corroborate any of Porter's libelous charges through any other source, although they admitted they knew it was important to do so.⁸ In fact, they said Examiner policy required corroboration.

⁷ Porter claimed to have told his father, his sister and a jail chaplain about the respondents' conduct. His father was deceased; the one occasion when appellants attempted to contact his sister she would not talk to them, and the existence of the chaplain could never be verified.

⁸ In light of appellants' stated belief that Richard Lee was factually innocent and "framed" for Leong's murder, there are some other obvious areas of investigation they failed to pursue. For instance, Richard Lee did not testify during his trial. Thus, he has never denied, under oath, killing Leong, nor has he denied the accuracy of Porter's

(6) In an internal memorandum from Ramirez to his editor and other Examiner employees, Ramirez admitted that Porter's statement should be viewed with skepticism. Ramirez himself testified that he did not believe everything Porter said in his affidavit, but characterized it as "exaggeration." Bergman also admitted at one point that he did not accept all of Porter's statement as being true.⁹

(7) When Bergman interviewed Porter in prison, Porter did not tell him of the alleged beatings by Erdelatz and McCoy which necessitated medical treatment. Appellants first learned this information when they received Porter's affidavit from Manning. Yet, no one spoke to Porter again to inquire about this new and significant information, and why Porter had not told Bergman during the interview. In fact, no one from the Examiner staff ever met with Porter. Ramirez even testified that he did not recall ever having a discussion with Bergman about his notes of the Porter interview. How-

trial testimony. To the contrary, he subsequently admitted to the police that Porter's testimony during his trial was truthful. (Neither did he do so during his habeas corpus proceeding. His testimony therein was limited solely to the fact that he had no knowledge of any promises made to Porter in exchange for his trial testimony.) Appellants also claim that proof of Lee's innocence was confirmed by the fact that he had a number of alibi witnesses. However, none of them were called to testify during his trial. Appellants interviewed them, as well as Lee's trial attorney, but failed to ask anyone why they were not called to testify during the Lee trial, or why they were not being used during the habeas corpus proceeding. Nor has anyone ever asked why Lee himself never testified to deny the murder or deny his confession to Porter. These are obvious areas of inquiry for anyone interested in determining Lee's factual innocence.

⁹ In his affidavit Porter claimed to have met with Merle over 30 times prior to trial for the purpose of memorizing the "script" of his trial testimony which Merle had allegedly prepared. Bergman and Ramirez both admitted they did not believe this many meetings took place. However, what they actually believed or did not believe was a question for the jury, and a legitimate inference can be drawn from his entire testimony that Ramirez did not believe Porter.

ever, he said Bergman told him Porter was "confused and disorganized about things."

(8) Appellants failed to follow through with an investigation into firsthand knowledge of Richard Lee's involvement in the murder. Shortly after Leong was killed and prior to Lee's arrest, Lee conferred with a prominent and highly respected criminal lawyer to discuss his case. This attorney did not represent Lee at trial, but appellants discovered the conference had occurred and contacted the attorney for information. The attorney advised them he could not discuss it with them because of the attorney-client privilege, but would do so if they obtained a release from Lee. However, *he also advised them that what he knew would not be helpful to Lee*. Appellants then asked Lee if he would waive the privilege to permit them to speak with the attorney. Lee agreed to do so, but advised appellants that he never discussed Leong's murder with the attorney. Appellants accepted Lee's story and never contacted the attorney again to determine what information he had.¹⁰ Although failure to investigate will not, by itself, necessarily support reckless misconduct, it is a factor which may be considered, at least where, as here, there was time to investigate. (*Herbert v. Lando, supra*, 441 U.S. at p. 164, fn. 12 [60 L.Ed.2d at pp. 126-127].)

¹⁰ This episode is representative of the inconsistency of appellants' positions both at trial and on appeal. They have repeatedly urged that one of the reasons they chose to believe the initial Porter story was because *they believed Richard Lee was factually innocent* of Leong's murder. Yet, the opportunity to obtain firsthand information from the first attorney Lee met with was readily available to them and they failed to examine it. This is particularly significant since the attorney told them his information would not be beneficial to Lee. Their explanation is "[b]ecause Ramirez felt that Richard Lee would not lie to him at that stage of their relationship, and *because at that point in their investigation the journalists' concerns had focused on the fairness of the criminal proceedings in San Francisco Chinatown cases rather than on the guilt or innocence of one person, Bergman failed to reinterview [the attorney] in the remaining weeks before the writing of the story.*" (Italics ours.)

(9) Most importantly, following his trial and conviction, *Lee admitted to the police that Porter's trial testimony was essentially accurate.*

Porter testified, in substance, that he was prompted into producing the false affidavit by Bergman's offers of help in removing the California detainer, and that Bergman knew his affidavit was false because Porter told Bergman that his testimony during Lee's trial was truthful. He said Bergman told him he needed a different sort of statement from him, and that if he changed his story Bergman would help him with the detainer. He said that when Bergman first asked him if the police had threatened him he told him they had not. Bergman then told him that the San Francisco police had been known to pressure people, to get false statements from them and threaten their lives. Bergman suggested that he would have to change his story if he expected help getting his detainer removed. He said Bergman asked him leading questions and suggested what he should say.

In addition, prior to the time Bergman first contacted him, Porter had written to Erdelatz and McCoy thanking them for their kindness and assistance during the Lee trial, and wished them and their families a Merry Christmas: unusual conduct by one who had been beaten and had his life threatened by those same officers.

With regard to the publication that Merle had been disciplined by the State Bar, the original source of that information was Patrick Hallinan, a local attorney, who advised Ramirez that he had officially complained about Merle to the State Bar. However, before the articles were written, Hallinan advised Ramirez that the State Bar proceedings against Merle had been dropped. Bergman admitted that he knew the charges had to be reviewed by a higher committee of the Bar, and that he was "not clear" whether Merle "had avoided sanctions at a higher level."

The foregoing constitutes not only substantial evidence that the publications were false, but also clear and convincing evidence to support a finding of actual malice under *New York Times*.

V

Appellants assign as error numerous evidentiary rulings by the trial court. At oral argument they advanced the theory that the definition of relevant evidence in Evidence Code section 210 and the court's discretion to exclude evidence under Evidence Code section 352 have no application to defendants in libel suits, although they contend the same statutes operate to limit plaintiffs' evidence. Specifically, they contend there are neither qualitative nor quantitative limits on the evidence which they can introduce to demonstrate their state of mind at the time of publication. Appellants offer no authority for this unique proposition, and we are aware of none. (15) We agree that defendants in libel actions, particularly those brought by public officers or figures, must be accorded wide latitude in presenting evidence bearing on their state of mind. (*St. Amant v. Thompson, supra*, 390 U.S. 727; *Herbert v. Lando, supra*, 441 U.S. 153; *Hearne v. De Young* (1898) 119 Cal. 670 [52 P. 150].) However, in the absence of contrary authoritative requirements, we will be guided by the Evidence Code and prior decisional law.

Evidence must be relevant to be admissible. (Evid. Code, § 350.) Relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see also, 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 19.2, pp. 452-453; Witkin, Cal. Evidence (2d ed. 1966) § 302 et seq.)

Article VI, section 13 of the California Constitution provides that "[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

A miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is *reasonably probable* that a

result more favorable to the appealing party would have been reached in the absence of the error. (*Clifton v. Ullis* (1976) 17 Cal.3d 99, 105-106 [130 Cal.Rptr. 155, 549 P.2d 1251]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853 [139 Cal.Rptr. 888, 93 A.L.R.3d 537].)

The Evidence Code provides additional guidance as to when an evidentiary ruling may be held erroneous and/or when a judgment may be reversed because of an erroneous admission or exclusion of evidence.

As to the erroneous admission of evidence, Evidence Code section 353 states that "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and (b) the court . . . is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

With regard to the erroneous exclusion of evidence, Evidence Code section 354 provides that "[a] verdict or findings shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court . . . is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; (b) The rulings of the court made compliance with subdivision (a) futile; or (c) The evidence was sought by questions asked during cross-examination or re-cross-examination."

Evidence Code section 352 states, "The court *in its discretion* may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of

undue prejudice, or confusing the issues, or of misleading the jury." (*Italics added.*)

The trial court's exclusive discretion to analyze and determine the evidentiary value of an offer of proof under section 352 attack is well established. (*Rosener v. Sears Roebuck & Co.* (1980) 110 Cal.App.3d 740, 756 [168 Cal.Rptr. 237]; *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 295 [136 Cal.Rptr. 603]; *Cain v. State Farm Mut. Auto. Ins. Co.* (1975) 47 Cal.App.3d 783, 798 [121 Cal.Rptr. 200].) In reviewing the trial court's exercise of discretion under section 352, "an appellate court is neither authorized nor warranted to substitute its judgment for that of the trial judge." Only where the alleged abuse of discretion clearly constitutes a miscarriage of justice, may the appellate court reverse the judgment. (*Cain v. State Farm Mut. Auto. Ins. Co., supra*, at p. 798.)

The trial court's discretion, under section 352, is not unlimited, however. It must balance the probative value of the proffered evidence against its prejudicial effect in the context of the case at hand. (*Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 774 [150 Cal.Rptr. 419].) The more substantial the probative value, the greater must be the prejudice in order to justify the exclusion. "If such *probative value is absent* [however], this court will not interfere with the trial court's determination [under section 352]." (*Brainard v. Cotner* (1976) 59 Cal.App.3d 790, 795 [130 Cal.Rptr. 915], *italics added.*)

A trial court's analysis, under section 352 objection, should include the following: the materiality of the evidence; the strength of its relationship to the issue upon which it is offered; whether it goes to a primary issue in the case; and whether it is necessary to prove the proponent's case or whether the evidence is merely cumulative to other available and sufficient proof. Cumulative evidence may be regarded as having less probative value. (*Burke v. Almaden Vineyards, Inc., supra*, 86 Cal.App.3d at p. 774; *Thor v. Boska* (1974) 38 Cal.App.3d 558, 568, fn. 8 [113 Cal.Rptr. 296].) Further, where the proffered evidence "obscur[es] the more immediate question" at hand, it is within the trial court's discretion to exclude it. (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 36 [161 Cal.Rptr. 516].)

Where the minimal probative value of the proffered evidence is outweighed by the disadvantage of protracting an already lengthy trial, it is not error for the trial court to exclude it. (*City of Los Angeles v. Retlaw Enterprises, Inc.* (1976) 16 Cal.3d 473, 491 [128 Cal.Rptr. 436, 546 P.2d 1390]; *Rosener v. Sears Roebuck & Co.*, *supra*, 110 Cal. App.3d at p. 756.)

Detrimental effect to appellant is not necessarily undue prejudice. When the only prejudice to the party lies in material and relevant inferences to a crucial issue, the trial court is within its discretion to admit such evidence. (*Burke v. Almaden Vine yards, Inc.*, *supra*, 86 Cal.App.3d at p. 773; *Thor v. Boska*, *supra*, 38 Cal.App.3d at p. 567.)

Within these guidelines we consider the various claims of error in the exclusion and admission of evidence.¹¹

(a) *Bergman's politics, family life and pending libel suit.*

Respondents were able to introduce, over objection, that Bergman had another libel suit pending and that he had children out of wedlock. Respondents contend the evidence concerning the pending libel suit was relevant in that it should have put the Examiner on notice that Bergman's material was suspect. They attempt to justify the evidence of Bergman's marital situation on the grounds that it showed he needed money to support his children. Since he was a freelance journalist working for the Examiner only for this series of articles, respondents reason that financial pressures forced him to get the story into print regardless of its accuracy or obvious harm to them. They also contend that this evidence was inevitably coming before the jury because it was contained in correspondence from Bergman to Porter, and since the correspondence was independently admissible, the objectionable material would also be in evidence. We agree with appellants that introduction of this matter was error.

¹¹ Appellants have assigned as error virtually every ruling made by the trial court. With some exceptions, they deal with the same general subject matter and may be decided collectively. We have classified them accordingly.

Libel suits are an inherent risk in the publishing business, and the mere fact that a suit has been filed on an unrelated matter does not establish that the reporter who wrote it was reckless or had knowledge that the article contained false facts, or that the pending action has any merit. In the instant case, it had no tendency in reason to put the Examiner on notice that Bergman's reports on the subject matter in the instant case were false or inaccurate.

Bergman's marital status is also irrelevant. The references in the correspondence to the pending libel action could easily have been deleted; the reference to Bergman's children does not even mention his marital status.

Appellants also contend that respondents were improperly permitted to explore Bergman's political beliefs, and to inquire about the newspapers for which he previously wrote, and the articles which he published. Respondents contend that articles published by Bergman which were critical of President Reagan, former Attorney General Evelle Younger and the F.B.I. showed that Bergman was "anti-administration," and that the publications which carried them were "radical" or "underground." They argue that Bergman's previous writings demonstrated his bias and put the Examiner on notice that such bias existed.

Inquiries into Bergman's general political affiliations and beliefs, unless clearly relevant, may violate his First Amendment right of privacy, (*N. A. A. C. P. v. Alabama* (1958) 357 U.S. 449 [2 L.Ed.2d 1488, 78 S.Ct. 1163]; *Britt v. Superior Court* (1978) 20 Cal.3d 844 [143 Cal.Rptr. 695, 574 P.2d 766].) In the context of the case before us we see no relevancy between Bergman's general political views (i.e., Democrat, Republican or other; "left," "right" or "middle") and his basic honesty or integrity for news gathering or reporting. However, if his previous writings or the particular publications for which he wrote display a bias against the police, the prosecution or law enforcement in general, the evidence of those writings and those publications becomes relevant. (Evid. code, § 780, subd. (f); 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 28.6, p. 900; Witkin, Cal. Evidence (2d ed. 1966) § 1229 et seq.; *Herbert v. Lando*, *supra*, 441 U.S. at p. 164, fn. 12 [60 L.Ed.2d at pp. 126-127].)

Our examination of the record reveals that the references to this material were few, and lacked emphasis. The witnesses acquitted themselves well on cross-examination, and we conclude that if any error existed in admission of this material, it was harmless.

(b) Evidentiary rulings in the Richard Lee trial.

Appellants claim error in the exclusion of evidence concerning the evidentiary rulings made by the trial court during the Richard Lee trial. They contend that the evidentiary rulings by the Richard Lee trial court were relevant to demonstrate that Lee did not receive a fair trial. At the time of trial in the instant case, Lee's conviction had been affirmed on appeal and was final. His habeas corpus petition had also been denied and was final. Thus, the issue of whether Richard Lee had received a fair trial had already been determined as a matter of law. Further, the "fairness" of his trial, in the abstract, was not in issue. Appellants were perfectly free to comment about the fairness or inequities of the justice system, but they were not being sued for that reason. The issue in the instant case was whether appellants published the libelous articles in question with actual malice. Admission of evidence concerning rulings in the preceding criminal trial would have protracted the trial of the instant case and would have confused the jury by introducing a remote and collateral subject. This material was irrelevant and, in any event, subject to exclusion under Evidence Code section 352.

(c) Chinatown background.

Appellants contend that evidence of various interviews and conversation with Chinatown youths, community leaders, police officers and social workers were erroneously excluded. They argue that these interviews were relevant to state of mind, in that they gave them an understanding of the relationship between the authorities and the Chinese youth, insight into other criminal cases arising out of Chinatown and police corruption and "payoffs" in that community. The trial court's exclusion of this evidence was based either on relevancy or Evidence Code section 352 grounds. We perceive no error in the trial court's rulings. Much of this evidence was cumulative and repetitious. Appellants

admitted they had *no evidence* that any of the respondents were involved in any corruption or "payoffs," and *none* of this evidence corroborated or supported Porter's initial story about subornation of perjury in the Lee trial. Any probative value such evidence would have was far outweighed by the undue consumption of time and confusion which would result from protracted litigation. (See, e.g., *Wagner v. Benson*, *supra*, 101 Cal.App.3d at p. 36.)

(d) *The Rubin Scott incident.*

Rubin Scott was a fugitive wanted for the murder of a San Francisco police officer. While at large he was arrested and held in New Orleans for a crime committed there. McCoy and Erdelatz learned of his capture and went to New Orleans to interview him in connection with the murder of the police officer in San Francisco. Unknown to them, a New Orleans judge had ordered that Scott not be interviewed about the New Orleans crime outside the presence of his Louisiana attorney. Erdelatz and McCoy obtained a confession from Scott concerning the San Francisco murder, but it was later ruled inadmissible by a San Francisco judge, presumably because it violated Scott's right to counsel under the order issued by the New Orleans court. In addition, it was alleged that Scott was physically abused by members of the New Orleans Police Department while he was in their custody. Erdelatz and McCoy were never accused of abusing Scott, nor was it alleged that any abuse took place in their presence. There was never any judicial finding of physical abuse and Scott himself, apparently during an unrelated proceeding in Los Angeles, denied that any such abuse took place.

The trial court granted respondents' motion to exclude any mention of the Rubin Scott incident under Evidence Code section 352 and on the grounds of relevancy. Appellants contend such evidence was relevant to their state of mind and its exclusion resulted in reversible error. We disagree, rejecting again appellants' argument that there are no limitations on the evidence which they are permitted to introduce to show state of mind. Their offer of proof failed to demonstrate that (1) respondents had any knowledge of the Louisiana court order, (2) respondents had any reason to believe they were prohibited from interviewing Scott concerning the murder of the San Francisco police officer,

(3) respondents had knowledge that Scott was assaulted by the New Orleans police; (4) respondents had otherwise conducted themselves improperly or unlawfully in connection with the Scott investigation. Given Scott's later denial of any brutality by the New Orleans police, it is obvious that any probative value of this evidence is substantially outweighed by the probability that its introduction would have necessitated undue consumption of time and confused the issues. (Evid. Code, § 352.)

(e) *The discovery sanctions.*

During the course of their investigation appellants were told by Attorney Patrick Hallinan that he had filed a charge of misconduct against respondent Merle with the State Bar. Bergman and Ramirez were advised by Larry Hatfield, an Examiner reporter, that Hatfield's confidential source at the State Bar said the bar was instituting disciplinary proceedings against Merle. However, by the time the article containing the disciplinary story had been published, the bar had dismissed the charges against Merle.

During discovery, Hatfield refused to reveal his State Bar source. A motion to compel revelation of the source ultimately resulted in an order which provided that if Hatfield failed to reveal his source appellants would be precluded from introducing any evidence pertaining to its existence, but Ramirez could testify that the information he received came from Hatfield, a respected reporter upon whom he had relied in the past.

Hatfield never revealed his source, and during trial the court refused to permit Ramirez to testify about how he received the information from Hatfield or about Hatfield's reputation as a journalist with State Bar sources. Appellants contend the sanctions were improper because Hatfield was not a party and they could not be punished for the refusal of a nonparty to respond to discovery. This contention is meritless.

Article I, section 2, subdivision (b) of the California Constitution and Evidence Code section 1070 prohibit contempt proceedings against publishers, editors, reporters and others for failure to reveal their sources of information. Code of Civil Procedure section 2034 provides, in part, that if any agent or employee of any party to an action fails to provide discovery or respond to

appropriate questions during his or her deposition, the court may impose reasonable sanctions or "make any orders in regard to the refusal which are just" The court can order, among other things, that the facts about which discovery was refused may be deemed to be established in accordance with the position of the opposing party. (Code Civ. Proc., § 2034, subd. (b)(2)(A).) Although Hatfield could not be compelled to reveal his source, the ruling was appropriate under these circumstances; Hatfield was employed by the Examiner.

In addition, Ramirez testified that before he wrote the articles Hallinan advised him personally that the State Bar proceedings had been dropped. Bergman testified that he knew Merle's case had to be reviewed by a higher State Bar committee, and that he was not certain whether Merle had "avoided sanctions at a higher level." Given this situation, we find no error. Even if it was error, it is harmless.

(f) *Miscellaneous rulings.*

Appellants attack other rulings excluding evidence: (1) McCoy's view of Porter's credibility, (2) postconviction questioning of Lee concerning an unrelated homicide, (3) Ramirez' mistake in erroneously publishing that Manning visited Porter on a second occasion, (4) the procedures within the Governor's office for removal of detainees, (5) Bergman's explanation for writing to Porter about removal of his detainer, and (6) alleged curtailment of cross-examination concerning damages.

We have already reviewed the appropriate rules of evidence and the standards of review. The parties are familiar with the facts and the record and we find it unnecessary to set out all their contentions in detail. It suffices to say that most of the matters complained of involved irrelevant evidence or were cumulative, subject to section 352 exclusion, or harmless. We cannot say their admission would have resulted in a verdict for appellants, or any of them.

VI

Appellants next claim error due to several jury instructions concerning libel, actual malice, privileged publications and damages.

The court's duty to instruct the jury is discharged if its instructions embrace all points of law necessary to a decision. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335 [145 Cal.Rptr. 47].) A party is not entitled to have the jury instructed in any particular fashion or phraseology, and may not complain if the court correctly gives the substance of the applicable law. (*Zhadan v. Downtown Los Angeles Motor Distributors, Inc.* (1979) 100 Cal.App.3d 821, 839 [161 Cal.Rptr. 225]; *Hyatt v. Sierra Boat Co.*, *supra*, 79 Cal.App.3d at p. 336.) Only if it appears that an error in instructions was likely to mislead the jury and thus become a factor in its verdict will error be considered prejudicial. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670 [117 Cal.Rptr. 1, 527 P.2d 353]; Cal. Const., art. VI, § 13.)

Appellants first contend the court erred by defining libel as a "false and unprivileged" publication and then refusing to define a privileged publication, as they requested. We have already concluded that the question of privilege is a legal issue for the court's determination and that no privilege existed under the facts of the instant case. Hence, no error occurred.

Second, appellants observe that the trial court did not use the term "actual malice" in defining respondents' burden of proof, but used it later when it instructed that "You cannot infer or presume actual malice solely from the fact that the publication was made. You are instructed that negligence by a publisher is not the equivalent, nor is it sufficient to prove reckless disregard or knowing falsity on the part of [appellants]." Appellants contend this generated confusion and requires reversal.

We conclude that the trial court addressed the issue sufficiently. In other instructions it advised the jury that respondents had to prove by clear and convincing evidence that appellants published the challenged statements with knowledge of their falsity or with reckless disregard of the truth. The court also

emphasized that negligence was not a sufficient basis for liability. Appellants further argue the instruction was erroneous because it only informed the jurors they could not infer actual malice from publication, whereas they contend the jury should have been instructed it could not infer actual malice from the content of the articles. This is a hypertechnical distinction which was unlikely to influence the jurors. We conclude the instructions in this regard were adequate.

Third, appellants challenge an instruction which stated: "Reckless disregard of truth or falsity may be found, even though an affidavit was obtained from a person, if there are obvious reasons to doubt the veracity of that person or the accuracy of his affidavit, and there is no other substantial independent support for the charges in the affidavit." Appellants claim this instruction led the jury to believe that failure to investigate, by itself, establishes actual malice, and that it implicitly shifted the burden of proof to them. We do not draw the same conclusion. The language of this instruction was taken from *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 154-155 [18 L.Ed.2d 1094, 1111, 87 S.Ct. 1975]. Appellants contend the facts in *Butts* were so radically different from those in the instant case as to render the instruction erroneous here. We again disagree, and conclude that this isolated instruction, when viewed in context, provides no cause for reversal. (*St. Amant v. Thompson, supra*, 390 U.S. 727; *Curtis Publishing Co. v. Butts, supra*, 388 U.S. at pp. 156-157 [18 L.Ed.2d at p. 1112]; *Reader's Digest Assn. v. Superior Court, supra*, 37 Cal.3d 244; *Widener v. Pacific Gas & Electric Co., supra*, 75 Cal.App.3d at p. 434.)

Finally, appellants complain about the form of the instructions concerning actual malice, defining reckless disregard and dealing with punitive damages. We have reviewed them in their entirety and in context with the entire package of instructions given the jury. They contain an accurate statement of the legal issues necessary for a determination of the issues with which they are concerned. In fact, the instruction on punitive damages actually favors appellants, since it advised the jury that the elements of punitive damages had to be proven by clear and convincing evidence, whereas a preponderance of the evidence is all that is

required. (*Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1008-1009 [193 Cal.Rptr. 206]; *Curtis Publishing Co. v. Butts, supra*, 388 U.S. at pp. 160-161 [18 L.Ed.2d at p. 1114]; *Cantrell v. Forest City Publishing Co.* (1974) 419 U.S. 245, 251-252 [42 L.Ed.2d 419, 426, 95 S.Ct. 465].)

VII

Appellants next challenge the punitive damage awards, contending the federal and state Constitutions bar awards of punitive damages to public officials in libel cases. They cite no controlling authority for this argument. Civil Code section 48a, subdivision 4(c) specifically permits punitive damages in libel cases, and we are required to interpret statutes so as to uphold their constitutionality, if at all possible. (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 253 [158 Cal.Rptr. 330, 599 P.2d 636]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 229-230 [110 Cal.Rptr. 144, 514 P.2d 1224].) Appellants have cited none and we are unaware of any decisions of the United States or California Supreme Courts holding that the federal or state Constitution bars public officials from recovering punitive damages in libel cases. However, numerous California and federal cases have approved or upheld such awards. In *Curtis Publishing Co. v. Butts, supra*, 388 U.S. 130, the United States Supreme Court addressed the same issue and rejected the concept that punitive damages are constitutionally prohibited in libel cases. (See *Herbert v. Lando, supra*, 441 U.S. at pp. 161-162 [60 L.Ed.2d at p. 125].) In *Maheu v. Hughes Tool Co.* (9th Cir. 1978) 569 F.2d 459, 478-479, the Ninth Circuit, citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997] and other federal circuits (*Goldwater v. Ginzburg* (2d Cir. 1969) 414 F.2d 324, cert. den., 396 U.S. 1049 [24 L.Ed.2d 695, 90 S.Ct. 701]; *Buckley v. Littell* (2d Cir. 1976) 539 F.2d 882, cert. den., 429 U.S. 1062 [50 L.Ed.2d 777, 97 S.Ct. 785, 786]; *Davis v. Schuchat* (D.C. Cir. 1975) 510 F.2d 731; *Appleyard v. Transamerican Press, Inc.* (4th Cir. 1976) 539 F.2d 1026; cert. den., 429 U.S. 1041 [50 L.Ed.2d 753, 97 S.Ct. 740]), concluded that punitive damages were constitutionally permissible in public official or public figure cases. California courts have

agreed. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20 [81 Cal.Rptr. 360, 459 P.2d 912]; *Burnett v. National Enquirer, Inc.*, *supra*, 144 Cal.App.3d 991; *Bindrim v. Mitchell*, *supra*, 92 Cal.App.3d 61; *Montandon v. Triangle Publications, Inc.* (1975) 45 Cal.App.3d 938 [120 Cal.Rptr. 186, 84 A.L.R.3d 1234]; *Field Research Corp. v. Patrick* (1973) 30 Cal.App.3d 603 [106 Cal.Rptr. 473].) In light of existing precedent, it is clear that no constitutional impediment exists to respondents' recovery of punitive damages.

It is equally clear that once the standard for liability has been met, the assessment of punitive damages has been left to state law. (*Curtis Publishing Co. v. Butts*, *supra*, 388 U.S. at pp. 160-161 [18 L.Ed.2d at p. 1114]; *Cantrell v. Forest City Publishing Co.*, *supra*, 419 U.S. at pp. 251-252 [42 L.Ed.2d at p. 426]; *Hunt v. Liberty Lobby* (11th Cir. 1983) 720 F.2d 631, 649-651; *Maheu v. Hughes Tool Co.*, *supra*, 569 F.2d at pp. 478-480; *Burnett v. National Enquirer, Inc.*, *supra*, 144 Cal.App.3d at p. 1008.) In California, Civil Code section 48a limits the right to recover punitive damages for libel from newspapers and broadcasters by requiring the plaintiff to demand a retraction and establish "actual malice" on the part of the defendant before punitive damages may be recovered. "Actual malice" under Civil Code section 48a is defined as "that state of mind arising from hatred or ill will toward the plaintiff,"¹² and it cannot be "inferred or presumed from the publication . . ." *Ibid.*; *Nova v. Flaherty* (1956) 145 Cal.App.2d 761, 764 [303 P.2d 382]. However, being a state of mind, it may be established by circumstantial evidence or inferred from other facts in the case. (Evid. Code, § 600, subd. (b); 4

¹² Subdivision 4(d) of Civil Code section 48a states: "'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant is the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice." This portion of the statute was enacted prior to the *New York Times* decision.

The proviso relating to good faith belief is irrelevant to the punitive damages definition of "actual malice" post-*New York Times*, since that state of mind would preclude initial liability in cases involving public officials.

Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 304, pp. 2575-2576; Witkin, Cal. Evidence (2d ed. 1966) § 367, pp. 326-327; cf., *Herbert v. Lando*, *supra*, 441 U.S. at p. 164, fn. 12 [60 L.Ed.2d at pp. 126-127]; *Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at pp. 257-258; *Davis v. Hearst* (1911) 160 Cal. 143, 179 [116 P. 530].)

Confusion inevitably results in libel cases involving public officials or figures seeking punitive damages because of the diverse uses of the terms "malice" or "actual malice," found in federal decisions, state decisions and various statutes. (See *Manguso v. Oceanside Unified School Dist.* (1984) 153 Cal.App.3d 574 [200 Cal.Rptr. 535] and *Burnett v. National Enquirer, Inc.*, *supra*, 144 Cal.App.3d 991.) "Actual malice" under the *New York Times* rule establishes the minimum federal constitutional test for liability, whereas "actual malice" under Civil Code section 48a sets forth the required state elements of punitive damages against newspapers. Both tests involve the defendant's state of mind, but under *New York Times* the focus is on the defendant's knowledge or attitude toward the material published; under Civil Code section 48a the focus is on the defendant's attitude toward the plaintiff. (See *Cantrell v. Forest City Publishing Co.*, *supra*, 419 U.S. at pp. 251-252 [42 L.Ed.2d at p. 426]; *Weingarten v. Block* (1980) 102 Cal.App.3d 129, 144-145 [162 Cal.Rptr. 701].)

The attempt to define "malice" or "actual malice" for punitive damages purposes has haunted the courts for years. The general subject matter has been exhaustively analyzed, criticized and commented upon and needs no repetition by us.¹³ It suffices to say

¹³ See, e.g., Hall, *Pleading in Libel Actions in California* (1939) 12 So.Cal.L.Rev. 225; Hall, *Proof in Libel Actions in California* (1951) 24 So.Cal.L.Rev. 339; *Punitive Damages and the Intoxicated Driver: An Approach to Taylor v. Superior Court* (1979) 31 Hastings L.J. 307; Comment, *Punitive Damages and the Drunken Driver* (1980) 8 Pepperdine L.Rev. 117; Symposium: *Punitive Damages Articles* (1982) 56 So.Cal.L.Rev. 1 et seq.; Franson, *Exemplary Damages in Vehicle Accident Cases* (1975) 50 State Bar J. 93; *Smith v. Wade* (1983) 461 U.S. 30, 38-55 [75 L.Ed.2d 632, 640-651, 103 S.Ct. 1625]; *Curtis Publishing Co. v. Butts*, *supra*, 388 U.S. 130; *Cantrell v. Forest City*

that the courts have not been consistent with their definitions, which is understandable in this difficult area. Part of the problem is due to the fact that the terms are used and repeated interchangeably in cases involving private as well as public figures, against defendants who are not newspaper publishers in addition to those who are, and in libel cases and general tort cases alike.

In *Davis v. Hearst*, *supra*, 160 Cal. 143, a libel case against a newspaper in which the plaintiff recovered punitive damages, the court discussed the element of malice contained in Civil Code section 3294, which at the time contained no definition of that term.¹⁴ "It should be apparent that the malice, and the only malice, contemplated by section 3294 is malice in fact, and that the phrase 'express or implied' has reference only to the evidence by which that malice is established; express malice thus meaning that the malice is established by express or direct evidence going to prove the actual existence of the hatred and ill-will; implied malice referring to the indirect evidence from which the jury may

Publishing Co., *supra*, 419 U.S. at pp. 251-252 [42 L.Ed.2d at pp. 426-427]; *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413-414 [134 Cal.Rptr. 402, 556 P.2d 764]; *Kapellas v. Kofman*, *supra*, 1 Cal.3d at pp. 28-31; *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 551-552 [343 P.2d 36]; *Davis v. Hearst*, *supra*, 160 Cal. at pp. 155-166; *Hearne v. De Young* (1901) 132 Cal. 357 [64 P. 576]; *Manguso v. Oceanside Unified School Dist.*, *supra*, 153 Cal.App.3d 574; *Burnett v. National Enquirer, Inc.*, *supra*, 144 Cal.App.3d at pp. 1005-1009; *Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767]; *Bindrim v. Mitchell*, *supra*, 92 Cal.App.3d at pp. 74-75; *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 26-32 [122 Cal.Rptr. 218]; *McCunn v. California Teachers Assn.* (1970) 3 Cal.App.3d 956, 962-964 [83 Cal.Rptr. 846].)

¹⁴ At that time Civil Code section 3294 stated: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

It has since been amended to define malice as "conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others."

infer the existence of this malice in fact. . . . [I]t is only upon some showing regarded by law as adequate to establish the presence of malice in fact, that is the motive and willingness to vex, harass, annoy, or injure, that punitive damages have ever been awarded. . . . [T]his malice, the existence of which we have declared to be essential to a recovery in punitive damages . . . is always in its analysis the malice of the one kind, the malice of evil motive . . . since the evil motive is the controlling and essential factor which justifies such an award. . . ." (*Davis v. Hearst*, *supra*, at pp. 162-164.)

Davis v. Hearst, *supra*, continues to be cited as a basic definition of malice,¹⁵ although in 1945 Civil Code section 48a was amended to, inter alia, substitute the phrase "actual malice" for "malice" and to define it as "that state of mind arising from hatred or ill will toward the plaintiff; . . ." The Legislature was presumably aware of the existing judicial interpretations of malice as contained in Civil Code sections 3294 and 48a, and had it intended to define the term with some lesser standard such as "wanton," "reckless" or "gross misconduct" it was free to do so.¹⁶ "It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing

¹⁵ See, e.g., *Kapellas v. Kofman*, *supra*, 1 Cal.3d 20; *Burnett v. National Enquirer, Inc.*, *supra*, 144 Cal.App.3d at pages 1006-1007; *G.D. Searle & Co. v. Superior Court*, *supra*, 49 Cal.App.3d at pages 29-30; *McCunn v. California Teachers Assn.*, *supra*, 3 Cal.App.3d at page 962.

¹⁶ A number of other cases over the years have articulated different standards. *Hearne v. De Young*, *supra*, 132 Cal. at pages 361-362, indicated that actual malice meant "'personal hatred or ill will towards the plaintiff, or wanton disregard of the civil obligations of the defendants toward the plaintiff.'" (Italics ours.) Even earlier, in *Turner v. Hearst* (1896) 115 Cal. 394, 401 [47 P. 129], the court stated: "Gross negligence or carelessness of the rights of others is frequently equivalent in law to an intentional or malicious disregard of those rights." In *Donnelly v. Southern Pacific Co.* (1941) 18 Cal.2d 863, 869-870 [118 P.2d 465], it was indicated that "wanton and reckless misconduct" was sufficiently descriptive of the malice necessary to support a punitive damage award.

domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them. [Citations.]' [Citations.]" (*Estate of McDill* (1975) 14 Cal.3d 831, 839 [122 Cal.Rptr. 754, 537 P.2d 874]; see also *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977-978 [140 Cal.Rptr. 669, 568 P.2d 394].) Thus, the Legislature has provided a specific restrictive definition of "actual malice" for purposes of Civil Code section 48a, and also taken care that such malice has to be directed toward the plaintiff(s)¹⁷ if punitive damages are to be awarded.¹⁸

¹⁷ We do not find *Kapellas v. Kofman*, *supra*, 1 Cal.3d 20, to be opposed. In that case, the Supreme Court held in a case of a mother and her children suing for libel, that the publisher's malice toward the mother was sufficient to permit the children to recover punitive damages. It was not necessary for them to prove that the publisher bore them any personal hatred or ill will, but they were still required to prove actual malice toward the mother. "Further, we do not believe that the availability of exemplary damages need be predicated on a showing of malice toward each individual child in a case in which it may be shown that the defendant's misstatements about the children arose from 'hatred or ill will' toward their mother. Exemplary damages are imposed 'for the sake of example and by way of punishing a defendant' (Civ. Code, § 48a, subd. 4(c)) and one who libels an innocent party with whom he has no dispute in order to injure a third party may well be thought more reprehensible than an individual who libels only his antagonist. To interpret section 48a, subdivisions 2 and 4(d) ('no exemplary damages may be recovered unless the plaintiff shall prove that defendant made publication . . . with actual malice;' 'actual malice is that state of mind arising from hatred or ill will toward the plaintiff . . .'), as barring such recovery unless each child could show that he was the personal subject of defendant's hatred would illogically grant greater protection to the disputants than to innocent individuals who may be deliberately injured; in light of the stated purposes of exemplary damages in the same provision (§ 48a, subd. 4(d)) we cannot accept such an interpretation." (*Id.*, at p. 30, fn. 7.)

The same reasoning applies to respondents herein. The libelous charges were directed at all three of them, and their close association in the prosecution of Richard Lee made it inevitable that actual malice directed toward any of them would result in damage to all.

The record¹⁸ herein supports respondents' position. The *knowing* publication of *false* criminal conduct as damaging to one's integrity and reputation as the charges in the instant case raises a legitimate inference of actual malice as defined by section 48a. (See, e.g., *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 574 [30 Cal.Rptr. 350].) In addition, the evidence supports the finding that Bergman knew that Porter's story was false—in fact, that it was entirely Bergman's creation. His testimony that he did not believe the articles were harmful to respondents was not only inherently improbable, it was contradicted by Ramirez and Burnhardt. He admitted that he knew Porter was not telling the truth about his daily meetings with Merle. He admitted that even before he collaborated on the articles he felt that respondents were "involved in a perversion and a corruption of the criminal justice system." The entire record supports a finding that Bergman acted out of ill will toward respondents. He also told Ramirez that *he did not want to be identified in the articles as the one who obtained the story from Porter*. The jury had ample evidence from which it could find actual malice as defined by Civil Code section 48a.

With regard to Ramirez and the Examiner, the record also supports a finding of actual malice under section 48a. Ramirez admitted he was attempting in the articles to convey the impression that respondents had "framed" Richard Lee. Like Bergman, Ramirez also admitted he did not believe all of Porter's initial affidavit. He also reported to his editors that Porter's statement should be viewed with skepticism. In spite of the fact that Ramirez and the Examiner knew it was important to verify Porter's claims, they were unable, in one and one-half years, to do so. In fact, all the available data indicated Porter was not telling the truth. They were advised that both Erdelatz and McCoy had good reputations, and were specifically told by their original

¹⁸ It might be argued that newspapers engaging in long term investigatory articles operate more like magazines and hence are not entitled to special statutory protection under these circumstances. (See e.g., *Burnett v. National Enquirer, Inc.*, *supra*, 144 Cal.App.3d 991.) However, the statute does not make this distinction, and we are disinclined to interpret it beyond its plain terms.

informant that the State Bar was not acting on the charges made against Merle. They knew from Bergman that Porter was told he would not receive any help toward eliminating his California detainer until he produced the favorable affidavit. Ramirez and the Examiner executives met regularly with Bergman. Ramirez claimed that at one point Bergman told them Porter was confused and disorganized about the events. Bergman told them he did not want to be identified in the articles as the one who obtained the information from Porter. Yet, neither Ramirez nor anyone else from the Examiner staff ever met with Porter or corroborated any of his statements. They deliberately chose not to obtain a direct account of the meeting between Richard Lee and his first attorney, even though that attorney advised them that his information would not help Lee. They knew that, following his conviction, Lee admitted to the police that Porter had testified truthfully during Lee's murder trial.

Given these circumstances the evidence supports a finding that Ramirez and the Examiner knew that Porter's statements to Bergman were false, and that they acted out of ill will toward respondents.¹⁹

VIII

Appellants also contend the damages are excessive. "The determination of damages is primarily a factual matter on which the inevitable wide differences of opinion do not call for the intervention of appellate courts. [Citation.] An appellate court, in reviewing the amount of damages, must determine every conflict in the evidence in respondent's favor and give him the benefit of every reasonable inference. [Citation.] An appellate court may not interfere with any award unless 'the verdict is so large that, at first blush, it shocks the conscience and suggests passion,

¹⁹Given our conclusion that the evidence supports a finding that Ramirez and the Examiner [p. 931] knew the articles were false, we need not and do not determine whether reckless disregard constitutes a state of mind sufficient to satisfy the standards of Civil Code section 48a.

prejudice or corruption on the part of the jury.’ ”²⁰ (*Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 241 [116 Cal. Rptr. 733]; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927-928 [148 Cal.Rptr. 389, 582 P.2d 980]; *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64-67 [118 Cal.Rptr. 184, 529 P.2d 608, 65 A.L.R.3d 878]; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919 [114 Cal.Rptr. 622, 523 P.2d 662].) Furthermore, when, as in the instant case, the trial court on motion for new trial has reviewed the issue of excessive damages and has denied the motion, its decision, although not binding on us, “is to be accorded great weight because having been present at trial the trial judge was necessarily more familiar with the evidence.” (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at p. 64; *Finney v. Lockhart* (1950) 35 Cal.2d 161, 164 [217 P.2d 19]; *Moranville v. Aletto*, *supra*, 153 Cal.App.2d at pp. 672-673.) “[T]he more reprehensible the act, the greater the appropriate punishment . . .” (*Neal v. Farmers Ins. Exchange*, *supra*, p. 928.)

We have here a situation wherein the evidence clearly and convincingly supports a finding that the affidavit of Porter which gave rise to the publication of the false charges was fabricated and encouraged by inducements to Porter of assistance in reducing his prison sentence—in short, a false charge created by a reporter for his own ulterior motives.

Each respondent testified to the shock and emotional effects they suffered as a result of the articles. They felt the publications had irrevocably damaged their respective careers and that the effects would be with them for the remainder of their lives. We also note that these particular charges are especially significant for persons in respondents’ professions. The destructive effect of false accusations of brutality, dishonesty and subornation of

²⁰ The record does not reveal any overt attempt by respondents to appeal to passion or to prejudice the jury. The examination and cross-examination of witnesses and the arguments of all counsel were carried out in a professional manner. In fact, the respondents’ arguments on damages were understated.

perjury on the careers of police officers and attorneys is self-evident.

The purpose of exemplary damages is to punish the defendant: to make an example and thereby deter others from similar conduct. (Civ. Code, § 48a, subd. 4(c); *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at p. 350 [41 L.Ed.2d at p. 811]; *Kapellas v. Kofman*, *supra*, 1 Cal.3d at p. 30, fn. 7.) In determining the amount of the award the jury may consider “ ‘ . . . the character of the defendant’s act, the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause, and the wealth of the defendant.’ ” (*DiGiorgio Fruit Corp. v. AFL-CIO*, *supra*, 215 Cal.App.2d at pp. 580-581; *Bertero v. National General Corp.*, *supra*, 13 Cal.3d at p. 65; *Burnett v. National Enquirer, Inc.*, *supra*, 144 Cal.App.3d at pp. 1010-1011.) (32C) The aggregate exemplary damages in the instant case amounted to approximately one-half the compensatory award. They were also adjusted significantly between the corporate defendant and the individuals, thus demonstrating the jury’s awareness of the factors involved. We must uphold an award of damages whenever possible (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at p. 61) and “[t]he fixing of such damages has long been vested in the sound discretion of the trier of fact” (*Id.*, at p. 64.)

In conclusion, we note that this unique record presents a textbook case of libel. It is a rare situation involving a fabrication of false charges which we assume does not recur with any frequency. We emphasize that the evidence does not establish and we do not imply that appellants Ramirez or the Examiner fabricated the Porter statement. The evidence does establish that they knew it to be false.

The judgment is affirmed.

Low, P. J., and King, J., concurred.

(Note—Appendices A through C referred to at B-1 are deleted since they are also included in Appendix A (A-44-A-69).)



(2)
No. 86-1336

Supreme Court, U.S.

FILED

APR 11 1987

JOSEPH F. SPANIO, JR.
CLERK

**In The
Supreme Court of the United States**
October Term, 1986

FRANK McCOY, EDWARD ERDELATZ, and
PIERRE MERLE,

Petitioners,

vs.

THE HEARST CORPORATION, a California
corporation, SAN FRANCISCO EXAMINER,
RAUL RAMIREZ and LOWELL BERGMAN,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of California

**BRIEF OF RESPONDENTS RAUL RAMIREZ AND
LOWELL BERGMAN IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Was the California Supreme Court correct in its unanimous determination that petitioners failed to introduce clear and convincing evidence of actual malice sufficient to sustain a jury verdict in a public official defamation case?

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CONSTITUTIONAL PROVISIONS INVOLVED

California Constitution, Article I, Section 2(a) provides:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

STATEMENT OF THE CASE

A. Proceedings in the California Supreme Court

The unanimous opinion of the California Supreme Court decided the following issues:

1. The First Amendment to the United States Constitution and Article 1, section 2 of the California Constitution protected the respondents when they published the articles which formed the basis of this suit. (App. 1).¹
2. The trial court erred in excluding the testimony of respondent Ramirez about the source of his published statements that petitioner Merle had been the subject of a State Bar disciplinary proceeding. (App. 38-39).
3. The trial court committed error when it instructed the jury on punitive damages under the wrong California statute. (App. 40-42).

¹Petitioner's Appendix is designated "App." The Petition is designated "Pet." The Reporter's Transcript of the trial below is designated "R.T." The Clerk's Transcript of the lower court proceedings is designated "C.T."

Several issues briefed and argued before the California Supreme Court were not decided. Involving both state and federal law, these issues were:

1. Whether trial courts have discretion to exclude evidence of the reporters' states of mind in a libel case without violating their constitutional due process right to a fair trial, when the primary factual issue in the case is the reporters' subjective states of mind; or whether the trial court abused its discretion in excluding their state of mind evidence.
2. Whether the trial court denied the respondents a fair trial by admitting evidence that one of the reporters had children out of wedlock, had written for "underground" newspapers, had a "radical" past, possessed "anti-administration" political views, and had been sued for \$400 million in an unrelated case involving an article on alleged organized crime figures in California published in *Penthouse* magazine.²

²The unrelated libel case against respondent Bergman never went to trial, and thus no court has ever found the *Penthouse* article to be defamatory. President Reagan recently commented on another libel suit arising out of the same article:

"For example, a magazine article exposing one of the mob's legitimate business fronts referred in passing to longtime La Cosa Nostra member Alameda ((Jimmy) Fratianno as 'an infamous hit man.' A mob lawyer and his La Cosa Nostra superiors ordered Fratianno to file a libel suit, which was eventually dismissed. Years later, facing a long jail term, Fratianno became a Government witness and admitted under oath that he had been directly involved in four mob murders and had incriminating advance knowledge in seven others. Fratianno claims his libel suit had been ordered for

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3. Whether the trial court properly instructed the jury when it declined to instruct on the constitutional principles of freedom of speech and press, and emphasized instead the duty of publishers to investigate the facts under an objective standard.

B. The Record

Petitioners are three public officials—two police inspectors and an assistant district attorney—who filed libel actions against respondent The Hearst Corporation, publisher of respondent *San Francisco Examiner*, and two reporters, respondents Raul Ramirez³ and Lowell Berg-

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the obvious purposes of raising the cost of hard-hitting reporting about organized crime and deterring journalists and publishers from doing their duty."

R. Reagan, "Declaring War on Organized Crime," *N.Y. Times*, January 12, 1986, § 6 (Magazine) at 27, 65-84.

³Raul Ramirez was born in Cuba on September 9, 1946, immigrating to the United States in April 1962 with his family. (R.T. 1934). After receiving a baccalaureate degree in journalism from the University of Florida, Ramirez worked on the staff of the *Miami Herald* for 2-1/2 years as a general assignment reporter. (R.T. 1939-40). When he left the *Miami Herald*, he joined the *Washington Post*, where he was again a general assignment reporter covering, among other things, criminal justice matters. (R.T. 1941). After two years with the *Washington Post*, Ramirez was telephoned by Randolph Hearst and asked to meet with editors of the *San Francisco Examiner*. (R.T. 1947-48). Ramirez joined the *Examiner* staff in July 1974 as a general assignment reporter. (R.T. 1599, 1949). He has covered the San Francisco and San Bruno jails, posing as a guard in those facilities for several weeks (R.T. 1949), and has written a story on Mexican prisons (R.T. 1951). Ramirez has won awards for his work as a journalist, both as a student (R.T. 1935-37) and as a reporter (R.T. 1599, 1949). His excellence as a journalist and

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man.⁴ The alleged libel arose from a series of articles in the *Examiner* about the trial of Richard Lee, who was convicted of the murder of a Chinese youth named Poole Leong on July 13, 1972 outside of a housing complex in the Chinatown section of San Francisco. (App. 44-69). The articles were written over a period of eighteen months. During this time, the reporters interviewed 40 people (App. 18-22), including two eyewitnesses to the killing who provided the reporters with affidavits. The first eyewitness, May Tom, a sixteen-year-old girl, stated that she was never certain she had correctly identified the assailant but had been pressured and knowingly misled by the police and prosecutor in the case into identifying Richard Lee as the

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his integrity as an individual were attested to by Larry Jinks, the editor of the *San Jose Mercury News*, and formerly the assistant managing editor of the *Miami Herald* (R.T. 4297-4300), and by Ben Bagdikian, a professor of journalism at the University of California at Berkeley and formerly an assistant managing editor for the *Washington Post* (R.T. 4336-41).

⁴Lowell Bergman, who was 33 years old at the time of trial (R.T. 2699), was a free lance writer from 1973 to 1976, which included the period during which the Richard Lee articles were prepared (R.T. 2538). Bergman graduated from the University of Wisconsin in 1966 with a B.A. degree in history (R.T. 2538), and subsequently attended graduate school for three years at the University of California at San Diego (R.T. 2539). He has worked for the *New York Times*, both as a consultant and as an investigative reporter; he has worked for the *Washington Post*; he has written for *Ramparts* magazine; and he has done investigative work for NBC News. (R.T. 2700). After publication of the Richard Lee articles, and after the filing of this lawsuit, Bergman was employed by ABC Television to be a reporter on ABC's investigative news show "20/20," a position Bergman continued to hold at the time of trial. (R.T. 2701). Bergman, who has won awards in the field of journalism (R.T. 2850-51), was praised as an outstanding, tireless reporter by ABC correspondent David Marsh (R.T. 4316-17).

killer. (R.T. 2251, 2725, 3984; C.T. 82, 83, 104, 105). The second eyewitness, Weyman Tso, was turned over to the police at the Hall of Justice by his attorney. (R.T. 683, 2896, 3182). He was then transferred to the Youth Guidance Center and later released from custody without being interrogated. (R.T. 684-86, 3183). He told respondent Ramirez, and swore in his affidavit, that he had indeed been at the scene of the crime, that he had seen the shooting, and that Richard Lee, whom he knew well, was not present or involved. (R.T. 2178-83; C.T. 109). He also stated that he had attempted to clear Lee's name while detained at the Youth Guidance Center, but that the police were not interested. (C.T. 109). These affidavits were reported in the Lee articles. Petitioners offered no evidence to question the statements made to the reporters by the only eyewitnesses to the crime.

The third affidavit obtained by the reporters was from Thomas Porter, the star prosecution witness at the *Lee* trial. Porter testified that while he and Lee were cellmates during pretrial detention, Lee had confessed to the murder of Poole Leong. Bergman wrote a letter to Porter, then incarcerated in a federal facility in Indiana, to inquire whether Porter would be interested in discussing the case. (App. 13). Within days, Porter telephoned Bergman to say that he had lied at the *Lee* trial in response to threats of violence and promises of leniency from the police and prosecutor, and felt great remorse. (R.T. 1026-27, 1201-02). Porter subsequently executed a detailed affidavit, which was drafted by an Indiana attorney, John Manning, for use in connection with a writ of habeas corpus on Lee's behalf. (R.T. 440-53; C.T. 75-80, Pl. Ex. 61).

Lee's petition for a writ of habeas corpus, supported by the affidavits of the two eyewitnesses and Porter, was filed several days after publication of the articles. The attorney handling the case, a former California trial judge, told respondent Bergman prior to the publication of the articles that in his professional opinion, it was one of the best documented cases for habeas relief that he had ever seen. (App. 34).

The California Attorney General's office contacted Porter in connection with the habeas petition. After a meeting with California officials, Porter repudiated his affidavit and executed a second affidavit asserting that he had testified truthfully in the murder trial. (R.T. 3795). After the trial and intermediate appellate courts had summarily denied his petition for habeas relief, the California Supreme Court granted Lee's petition for hearing and required the Superior Court to hold an evidentiary hearing. (R.T. 4009). The Supreme Court mandated further judicial review, based in part on Porter's first affidavit, although it also had Porter's recanting affidavit at the time it granted relief (App. 33).⁵

The reporters' intensive 18-month investigation was not confined to participants in the *Lee* trial, but included interviews with attorneys, journalists, social workers, police officers, and leaders of and experts on San Francisco's Chinatown community. (App. 18-22). The reporters found substantial evidence which in their minds tended to show that Lee had been wrongfully convicted and that petitioners could have engaged in the misconduct alleged by Porter. (App. 18-21). Near the conclusion of their research, the

⁵Habeas relief was ultimately denied. (R.T. 4009-10).

reporters attempted to interview all three petitioners to learn their version of the events. Each refused to discuss the Richard Lee case. (R.T. 646-48, 923, 1757, 1766-68, 1850-51, 2246, 3184, 3463-65).

At the close of their investigation, the reporters believed that the evidence they had accumulated raised serious questions about San Francisco's criminal justice system and, particularly, its treatment of members of racial minorities, which should be brought to the public's attention. (R.T. 2273-74, 2688, 2743-45). The articles, questioning the fairness of the *Lee* conviction, were published in the *Examiner* as a three-part series, running from May 19 through 21, 1976. (App. 44-69).

REASONS FOR DENYING THE WRIT

Three aspects of the Petition are noteworthy. First, petitioners omit any discussion or analysis of *Bose Corporation v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). They make no effort to illustrate the manner in which they believe the California Supreme Court departed from the teachings of *Bose* in its careful review of the evidence of actual malice. They do not explain the actual guidelines or standards to be applied by an appellate court in making its independent review of constitutional facts. Moreover, they leave open the critical question of how review in a case involving First Amendment rights would differ from an ordinary civil appeal. Indeed, petitioners do not appear to acknowledge that *Bose*, or *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), had any effect upon the standards of appellate review.

Second, no matter what uncertainty petitioners read into the *Bose* opinion, petitioners' principal evidence, the testimony of Thomas Porter, was offered only in the form of deposition and affidavits. This is not a case where a jury had an opportunity to observe Porter and evaluate his demeanor. Porter's deposition testimony was characterized by inconsistency, contradiction and ambiguity. Even under Rule 52(a), Fed. R. Civ. P., when the testimony of witness is so internally inconsistent or inherently impossible that a reasonable fact finder would not credit it, a reviewing court may find error "even in a finding purportedly based on a credibility finding." *Anderson v. Bessemer City*, — U.S. —, 84 L.Ed.2d 518, 529 (1985). In a public official libel case, this Court has ruled that summary judgment in favor of the defense is justified where "the evidence presented in the opposing affidavit is of insufficient caliber or quality to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Anderson v. Liberty Lobby*, — U.S. —, 91 L.Ed.2d 202, 215 (1986). Thus, under any interpretation of *Bose*, the California Supreme Court was correct in reversing the judgment entered in this case.

Third, the jury delivered a general verdict in this case. Contrary to petitioners' suggestion (Pet. 12), it is far from clear that the jury believed Porter and disbelieved Bergman. The jury might well have concluded that the reporters acted with reckless disregard under an erroneous jury instruction that advised the jurors that they could impose liability based on an objective standard of journalistic con-

duct rather than a finding of subjective doubt.⁶ A public official libel case decided by jury verdict presents the “strongest case for independent fact finding” by the appellate court. *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. at 518 n.2 (Rhenquist, J., dissenting).

I. THE CALIFORNIA SUPREME COURT DID NOT DISTURB ANY CREDIBILITY CHOICE IN DETERMINING THAT THE RECORD BELOW FAILS TO SUPPORT A CONCLUSION THAT RESPONDENTS ACTED WITH ACTUAL MALICE.

Petitioners have presented a highly selective summary of the record which they contend supports the \$4.6 million libel judgment. Culling fragments from the transcript of a six-week trial, which is clearly impermissible under *Bose*, results in an incomplete and distorted picture of the evidence.⁷ A more accurate and complete depiction of the trial proceedings is summarized in the California Supreme Court’s opinion. (App. 1-2, 10-25). A brief review of the evidence of malice in the trial record, presented below, establishes that the California Supreme Court was correct in concluding, upon an independent review of the constitutional facts in that record, that petitioners below totally failed to establish clear and convincing evidence of actual

⁶Respondents argued on appeal that the jury instruction defining reckless disregard for the truth erroneously focused on objective conduct rather than subjective belief. This was one of the issues left unresolved by the California Supreme Court.

⁷The California intermediate Court of Appeal, while purporting to follow *Bose*, committed the same error in focusing only on selected portions of the record to sustain the judgment below. App. B.

malice.⁸ That decision can be reached and was reached by the California Supreme Court without reassessing legitimate findings regarding the credibility of witnesses.

A. Evidence of Knowing Falsity

Petitioners' case for malice depended on the testimony of Thomas Porter, who testified at the libel trial by deposition. Petitioners focused on a portion of that deposition testimony, claiming throughout the trial and appellate proceedings that it furnished proof that Bergman and Porter had made a bargain whereby Porter would give false affidavit in exchange for assistance from Bergman with Porter's legal situation. (Pet. 11-12). However, as the California Supreme Court concluded, petitioners cannot rely "on this isolated piece of ambiguous evidence as sufficiently *clear and convincing* proof that Bergman knowingly solicited the intricate lie that Porter proceeded to tell and tell again." (App. 29; emphasis in original). Even looking at the isolated passages stressed by petitioners, without considering the many contradictory portions of Porter's own deposition testimony and Bergman's live testimony, the testimony simply does not establish that any agreement made by Bergman to assist Porter was an arrangement that Porter give false testimony. As the Supreme Court concluded, the testimony at best suggests that Porter heard "leading questions" or "certain suggestions" from Berg-

⁸Had respondent reporters been able to make a complete trial record documenting their good faith belief in the truth of their articles, the conclusion that respondents failed to act with actual malice would have been even more apparent. The trial court excluded 30 items of evidence relating to the reporters' investigation and conclusions they drew about the Lee prosecution.

man, which led Porter, skilled at manipulation, to believe that Bergman wanted a different story. (R.T. 975, 1215-17, 1377-80). But even the passages of Porter's testimony most helpful to petitioners provide, as the California Supreme Court concluded, "no evidence that Bergman's request that Porter give another story was a request that Porter give *false* testimony, although Porter apparently construed it as such a 'suggestion,' or came as a response to Porter's telling him that he had told the truth at trial." (App. 30).

Moreover, under any interpretation of *Bose* and *New York Times*, petitioners are unjustified in seeking to sustain the jury verdict by mere fragments of Porter's testimony. Porter's deposition testimony, considered in its entirety, is equivocal, internally inconsistent, confused and confusing. Petitioners describe Porter's deposition testimony as though Porter gave a straightforward version of events in direct conflict with Bergman's and that the jury was entitled to choose which witness to believe. But in fact Porter contradicted himself so frequently that no reasonable jury could have found clear and convincing proof of malice from Porter's deposition testimony. Substantial portions of Porter's deposition testimony contradict any implication that he told Bergman that his *Lee* trial testimony was true. It is undisputed that, during Porter's first contact with Bergman, Porter advised Bergman—with no prompting from the reporter—that he had lied at the *Lee* trial and suffered great remorse. (App. 13). In addition, Porter testified that during Bergman's visit to Porter in the Indiana penitentiary, Porter again told Bergman that he had lied at the *Lee* trial and wished to make amends:

Q. And did he [Bergman] come to see you?

A. Yes.

Q. How long did he visit with you?

A. About two, three hours.

Q. Didn't during that visit you also tell him that you lied during the Richard Lee trial?

A. Yes.

Q. You did tell him that, didn't you?

A. Yes.

Q. Okay. Why did you tell him that you lied at the Richard Lee trial?

A. The reason I told him that there is because he indicated that I was—that the whole thing that he had on the Richard Lee trial was false, and then he had mentioned that the San Francisco Police Department do set people up and put them in a position to set another person up and he had heard of it before happening and that he was aware of my five to life.

Q. During this meeting, isn't it true that you were angry at the police department and the D.A.'s office?

A. Yes.

Q. Isn't it also true that you saw this as an opportunity to get back at them?

A. Yes. Mainly to get out of that five to life.

Q. Okay. During that meeting, didn't you say that you had never done anything like this before and it weighs on you?

A. Yes, I think I said that.

Q. And you were referring to your testimony at Richard Lee's trial, right?

A. I think so.

Q. Okay. So the fact that you testified falsely at Richard Lee's trial weighed heavily on you, right?

A. I didn't testify falsely there.

Q. But you told Lowell Bergman that you testified falsely, didn't you?

A. Right.

(R.T. 1029-30).

Thus, Porter contradicted himself on the question of what he had told Bergman during the reporter's first interview. On other points, Porter's deposition testimony is inherently incredible and contradicted by other witnesses, including petitioners themselves.⁹

⁹For example, Porter testified that he initiated the contact with petitioners by sending out a letter from his jail cell to the police stating that he had information bearing on Lee's guilt (R.T. 1122-27, 1182-83); petitioners testified that they learned that Porter was friendly with Lee from an informant, Lydell Moore, and brought Porter out to question him (R.T. 610-12, 707-12, 805-07, 3163). Porter also testified that Lee told him in jail that he was questioned by the authorities "all that night when he first came in" (R.T. 1058), although petitioners testified that they conducted no interrogation of Lee, who declined to be questioned in the absence of counsel (R.T. 590, 3155).

Nor is Porter's testimony bolstered by Bergman's letters. In context, the letters cited by petitioners support Bergman's testimony, showing that his motivation "is to set the record straight" in the Richard Lee case. (Pl. Ex. 27, 28; App. 17). There is absolutely nothing in the letters suggesting that Bergman wanted a false affidavit from Porter. The most that could be inferred from the letters is that Bergman agreed to assist Porter after Porter had executed an affidavit to right the wrong he had inflicted on Richard Lee by giving perjured testimony for the prosecution in Lee's case. (App. 17-18).

The California Supreme Court was in as good a position as the trial judge and jury to evaluate Bergman's letters and Porter's deposition testimony. Thus, since no judge or jury had an opportunity to view petitioners' star witness, the test of appellate review they apparently seek in this case has never been applied in any reported decision. Under any interpretation of the scope of appellate review established by *Bose*, the California Supreme Court was clearly correct in ruling that Porter's deposition testimony failed to establish clear and convincing proof of malice.

Against Porter's equivocal, inconsistent, and incredible deposition testimony was Bergman's clear and unwavering testimony that Porter telephoned and told him, with no prompting, that he had testified falsely at the *Lee* trial (R.T. 2729-30) and repeated that story when Bergman visited him in Indiana (R.T. 1662, 2746). Petitioners attempt to undermine Bergman's credibility by questioning his opinion of the damage the articles would inflict on petitioners and pointing to an omission in interrogatory answers regarding Porter's telephone calls. These two re-

sponses, culled from hours of cross-examination, hardly constitute substantial impeachment. Petitioners in fact *had* suffered no tangible injury resulting from the articles by the time of trial,¹⁰ and Bergman's recollection that Porter expressed fear of reprisal for his *Lee* trial testimony was substantially consistent in his interrogatory answers and trial testimony.¹¹

More fundamentally, petitioners cannot create a case for malice by discrediting Bergman. "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. at 512; *cf. Anderson v. Liberty Lobby*, 91 L.Ed.2d at 217 (plaintiff must affirmatively present evidence of malice to defeat summary judgment in defamation action). Petitioners do not have clear and convincing evidence of knowing falsity in the isolated passages of Porter's deposition testimony. Thus, they would fail even if they could discredit Bergman's clear and unwavering trial testimony.

B. Evidence of Awareness of Probable Falsity

Petitioners' case for reckless disregard of the truth rests primarily on the alleged failure of respondents to

¹⁰They had suffered no loss of status, seniority or salary; there had not been even an internal review of the allegations in the articles by their employers. (R.T. 688-90, 837-38, 3199-200, 3491, 3354).

¹¹The interrogatory answers briefly identified the major substance of telephone conversations, charting events in Porter's life at the time. Bergman's testimony, that a constant theme of Porter's was fear of retribution if he had to testify while in custody in California, was not inconsistent with the information conveyed in the interrogatory answers. (R.T. 2856, 2871-80).

corroborate Porter's affidavit. (Pet. 12). The duty to corroborate, they contend, stemmed from Porter's unreliability as an inmate and confessed perjurer. The dilemma they face is the inherent contradiction between their case for knowing falsity and their case for reckless disregard: if Porter was so unreliable as to make it nearly conclusive that respondents should not have believed him, then this unreliability infects petitioners' case for malice. Petitioners cannot have it both ways: they cannot argue in the same petition that the California Supreme Court was required to find clear and convincing evidence of malice because Bergman and Ramirez used Porter without sufficient corroboration, and simultaneously argue that the California Supreme Court was required to find clear and convincing evidence of malice from Porter's uncorroborated, unconvincing and contradicted tale of a deal he struck with Bergman. The California Supreme Court correctly exposed this fundamental flaw in petitioners' case:

Finally, it is noteworthy that respondents [petitioners before this Court] now seek a ruling from this Court that since Porter was a prisoner with something to gain, there were obvious reasons to doubt his credibility and thus any reliance on Porter was reckless. Yet, thrice in the history of these proceedings, respondents [petitioners before this Court] have relied upon statements and stories from Porter: once, to convict Richard Lee; a second time to defeat Lee's habeas corpus claims; and a third time to obtain a multi-million dollar libel judgment. These litigious ironies do not excuse appellants [respondents before this Court] from accountability for recklessness if they possess a "high degree of awareness . . . [of] probable falsity." [Citations]. However, they do undermine the strength of respondents' [petitioners before this Court] suggestion that "only a reckless man" could have believed the things Porter had to say. [Citation].

(App. 34).

Both reporters testified that they believed that Porter was telling the truth (R.T. 1722, 2369, 2751), because of risks he was taking by stepping forward and putting his charges in an affidavit (R.T. 2058).¹² Moreover, respondent reporters did find substantial evidence during their 18-month probe, which, in their minds, tended to confirm Porter's allegations. This included accusations by attorneys and journalists that petitioners had engaged in unethical conduct toward witnesses and accused persons in several other criminal cases, evidence of unethical behavior toward Porter, Lee and May Tom in prosecuting the Lee case, and documents establishing the existence of a bargain negotiated between Porter and the authorities in exchange for his testimony.¹³ The reporters also learned

¹²Petitioners' summary of the testimony of Bergman and Ramirez is misleading in suggesting that they doubted Porter's veracity. Bergman's testimony that it was important to find someone who could corroborate Porter was not a statement, or even suggestion, that he doubted Porter; indeed, he denied doubting the truth of the Porter allegations in response to the very next question. (R.T. 2616). In the cited passage, Bergman stated only that if Porter's crime partner could corroborate Porter, she would be an important witness. (*Id.*)

Similarly misleading is the citation to Ramirez's testimony that he did not believe portions of Porter's testimony. Ramirez testified that he found some of the details of the Porter affidavit to reflect the exaggerated recollection of an inmate who was somewhat disorganized in his thinking. (R.T. 1674, 1694-1710, 2570-73, 2611-14, 2745). He did not disbelieve Porter, but thought that he met with the prosecutor numerous times and that making money to pay Sybil's bond meant reducing the amount of bond, which the prosecutor would be able to do. (R.T. 1714-17).

¹³The details on these charges are set out in the California Supreme Court's opinion at App. 18-21. An example is the

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of a strained relationship between the San Francisco Police Department and the Chinatown community, leading to an inability to investigate Chinatown homicides, which in their minds furnished a backdrop against which the Porter story was plausible.¹⁴

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testimony of May Tom, who told numerous attorneys and writers, and repeated to Ramirez, and placed in a signed affidavit, that she was mistreated by petitioners in the Richard Lee investigation and prosecution. She alleged that in their zeal to convict Richard Lee, they bullied and lied to her; in response to her expressed uncertainty about her identification of Lee, they told her falsely that there were other witnesses against Lee. (C.T. 82-83; R.T. 2104, 2151, 2159, 2254, 2722, 2725, 3984, 4050).

In addition to the evidence in the record, respondent reporters learned of misconduct by petitioners towards another inmate in custody, which respondents were barred from telling the jury. According to respondents' offer of proof, the reporters were told by attorneys that petitioners McCoy and Erdelatz had obtained a confession from an accused person in custody in Louisiana without the presence of his lawyer in violation of an outstanding order and had misrepresented facts in connection with the confession under oath. The confession was ultimately suppressed by a Superior Court judge. The reporters were also told that petitioners McCoy and Erdelatz had been aware that Louisiana authorities were physically abusing the inmate—because they were outside the door when it occurred—did nothing to intercede, but questioned the inmate, who showed physical marks from the abuse, the following day. (R.T. 492-93, 671-82). The exclusion of this state of mind evidence was one of the issues raised on appeal, but not decided by the California Supreme Court.

¹⁴Some police officers were considered hostile to the Asian community for racial reasons and for a perceived failure to cooperate with police investigations, which could have led to a mounting frustration and eagerness to obtain a conviction at any price in a Chinatown homicide case. The trial court barred the reporters from introducing evidence on this aspect of their investigation. (R.T. 2132, 2138, 2152-53, 2202-06, 2414-17, 2793, 2797). This was one of the issues briefed, but not decided by the California Supreme Court.

Petitioners' claim that the reporters were unable *directly* to corroborate Porter's allegations—and that they therefore should not have published the fact that he had put them into a sworn affidavit—is a contention that the California Supreme Court correctly rejected. Government misconduct of the kind charged by Porter is inherently incapable of objective proof. The reporters learned from high-ranking officials in San Francisco's justice system, including the District Attorney and Undersheriff, that the lack of a paper trail should not be construed as evidence that the Porter allegations were untrue (R.T. 1728, 2147, 4393).¹⁵ Moreover, Porter's accusations involved conduct which could hardly be expected to have witnesses.¹⁶

¹⁵Petitioners stress that the jail records did not document Porter's claim that he was removed from his cell on numerous occasions to meet with petitioners and to obtain treatment for a cyst caused by a blow from petitioner Erdelatz. They point to the testimony of their witness, Frank Heugle, who stated that these absences should have been recorded. (Pet. 7, n.3). However, Heugle's own testimony on cross-examination showed that the jail record system was confused and subject to error. (R.T. 2936-39). Heugle's superior, the Undersheriff of San Francisco, testified on respondents' behalf that he told Ramirez that the jail records were totally unreliable. (R.T. 2147-51, 4393). Moreover, Ramirez had posed as a deputy sheriff in researching an article about the San Francisco jails system, and thus knew from firsthand observation that the record system was subject to error. (R.T. 1949).

This aspect of the case—where the weight of the evidence clearly favored respondents—is a good illustration of the inadequacy of petitioners' case for malice and their presentation of the issue in this petition. Under any interpretation of *Bose*, the California Supreme Court was justified in concluding, after its independent review of the record, that a jury could not find that the lack of an official jail record furnished grounds for finding that the reporters harbored actual doubts about the truth of their articles.

¹⁶In support of their claim that the California Supreme Court was obligated to uphold the jury verdict, petitioners point to a

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It was well within the California Supreme Court's province to conclude that this absence of direct corroboration of events which would rarely be subject to direct proof could not sustain a finding that the reporters actually doubted the truth of their articles.

The other evidence of "reckless disregard" cited by petitioners again illustrates the mechanical approach to this case which the California Supreme Court correctly rejected. Petitioners present a few incidents which establish, at most, departures from a journalistic ideal.¹⁷ They

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passage of Ramirez's testimony in which "Ramirez also acknowledged that he was never able to confirm the charges of brutality and threats (R.T. 1639:19-22)." (Pet. 13). In context, the transcript shows that Ramirez was asked whether "any individual" confirmed the brutality and threat charge; Ramirez responded that "[a]ccording to his [Porter's] story, it happened in an elevator with only the two police officers present" (R.T. 1993) and that therefore there was no witness who could give direct confirmation of the charges. Of course, the only people who could directly confirm the incident were petitioners, who refused to speak with the reporters about the Lee case prior to publication.

Petitioners continue to stress that the reporters were unable to locate any of the three people to whom Porter said that he told his story. The reporters' vigorous investigation, however, never disproved the existence of these people, and, as the California Supreme Court observed, Porter confirmed the existence of one of them even when he testified by deposition on petitioners' behalf. (App. 35, n.30).

¹⁷Petitioners cite an incident where the reporters failed to reinterview a witness, and a minor, nondefamatory error printed after publication of the articles which form the basis for the defamation charge. (Pet. 9, n.4, 5).

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do not, even standing alone, furnish evidence from which a jury could reasonably have concluded that the reporters harbored actual doubts about the truth of their publication. In addition, the California Supreme Court was entitled, indeed obligated, to review *all* of the evidence submitted. Having done so, the Court was manifestly correct in its unanimous conclusion that a jury could not reasonably find actual doubt in light of the reporters' 18-month investigation, and the corroboration it produced of the articles' central thesis that the Richard Lee case deserved reexamination by the courts.

(Continued from previous page)

As the California Supreme Court concluded, the reporters' failure to interview an attorney contacted by Richard Lee had no relevance to the defamation charge, as it was undisputed that the attorney had no knowledge of any of the allegedly defamatory accusations made by Porter. (App. 37-38). The reporters testified that they failed to follow up with the attorney because they had contacted him for a limited purpose—to confirm that Lee had sought counsel—close to publication of the articles, and that they believed Lee, who allowed them to interview the lawyer by waiving his attorney-client privilege but advised them that any information the lawyer would have would be irrelevant to the Poole Leong murder. (R.T. 1733, 2685).

The error concerning John Manning's visit to Porter was simply that—a mistake, with a reasonable explanation. Bergman had mailed clippings about Chinatown to John Manning, to inform the Indiana attorney about conditions in San Francisco's Chinatown. Manning showed *those* clippings to Porter during his initial interview with the inmate, who was very interested in them. In a telephone conversation, Manning related this incident to Ramirez, who misunderstood the timing of the visit. The trial court barred Ramirez from explaining to the jury how this error had occurred. (R.T. 1905-07). That ruling is one of the evidentiary rulings that respondents challenged on appeal. Even on the incomplete record, no jury could reasonably find malice from the error, which had no relation to the allegedly defamatory material.

II. THERE IS NO REAL CONFLICT IN THE REPORTED DECISIONS FOLLOWING BOSE CORP. V. CONSUMERS UNION OF U.S., INC.

The question petitioners seek to have this Court review was actually settled by the decisions of this Court reaching their conclusion in *New York Times Co. v. Sullivan* and *Bose Corp. v. Consumers Union of U.S., Inc.* The California Supreme Court devoted several pages of its opinion in its independent review of the whole record. The cases decided after *Bose* applied no different principle.

In the cases cited by petitioners, there was a direct conflict in the testimony of the plaintiffs and the authors of the publication. There was no such direct conflict between witnesses in the present case: Porter's deposition testimony was not in direct conflict with that of respondents. In reaching its verdict, the jury was required to draw inferences from Porter's inconsistencies and to compare those inferences with the remainder of the evidence relating to actual malice. Porter's deposition testimony did not allow this to be a "look them in the eyes" case, as in *Dombey v. Phoenix Newspapers, Inc.*, 159 Ariz. 476, 724 P.2d 562, 576 (1986), or one where the parties directly contradicted each other without any room for dispute as in *Tosti v. Ayik*, 394 Mass. 482, 476 N.E.2d 928, 936 (1985). In this case, the jury was required to draw inferences from testimony with inherent complexities in ap-

plying the constitutional standard. *See Time v. Pape*, 401 U.S. 279, 284-86 (1971).¹⁸

O

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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April 13, 1987
San Francisco, California

¹⁸There are other significant distinctions between this case and any cited cases which account for any apparent conflict in applying the principles of *New York Times* and *Bose*. For example, the Virginia Supreme Court applied the actual malice standard only to the issue of punitive damages. *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 727 (Va. 1985). The Second Circuit case of *Larmin v. Flynt Dist. Co., Inc.*, 745 F.2d 123, 140-41 (2d Cir. 1984), is completely consistent with the decision of the California Supreme Court because the Second Circuit found insufficient evidence of actual malice to create a jury question.

Petitioners also refer to *Starkins v. Bateman*, 150 Ariz. 537, 72 P.2d 1206 (1986), and *Anderson v. Liberty Lobby, Inc.* to support their contention of a conflict in the reported decisions. *Starkins v. Bateman* was decided by the Court of Appeals of Arizona, an intermediate appellate court. It is not a state court of last resort under this Court's Rule 17.1(b). *Anderson v. Liberty Lobby, Inc.* determined only under what circumstances summary judgment should be denied in defamation cases. It did not make any effort to describe the procedure to be followed by the reviewing court in making its independent review of the whole record after a jury verdict.

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No. 86-1336

Supreme Court, U.S.

FILED

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

FRANK MCCOY, EDWARD ERDELATZ and PIERRE MERLE,
Petitioners,

VS.

THE HEARST CORPORATION, A California Corporation,
SAN FRANCISCO EXAMINER, RAUL RAMIREZ
and LOWELL BERGMAN,
Respondents.

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the California Supreme Court correctly conclude that the evidence in this case was insufficient to show with convincing clarity that respondent reporters and newspaper acted with actual knowledge of falsity or a high degree of awareness of probable falsity?*

* The San Francisco Examiner is wholly owned by The Hearst Corporation. The Hearst Corporation is part owner of the following affiliates: The San Francisco Newspaper Printing Company, Inc., and Hearst/ABC Video Enterprises Inc., a joint venture with ABC Video Enterprises, Inc. (a wholly owned subsidiary of Capital Cities/ABC, Inc.).

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The fundamental premise underlying the petition—that the California Supreme Court held that an appellate court may “disregard reasonable findings and credibility determinations made by a jury” (Pet., p. i)—is wrong. The California court held no such thing. Rather, the court recognized that, pursuant to the constitutional principles set forth in *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, an appellate court “must make an independent assessment of the entire record * * * only as it pertains to actual malice” (Appx., p. A4).¹ After an exhaustive review of the record (see Appx., pp. A10-A23, A28-A39), the California court concluded that petitioners had failed to

¹ The California court was careful to note that “[i]ssues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review” (Appx., p. A4).

meet their burden of providing clear and convincing proof of constitutional actual malice.

Even if, as petitioners assert, a "hot debate" exists as to the proper scope of appellate review (see Pet., p. 13), the opinion below does not present any issues in that debate. A unanimous California Supreme Court, properly applying this Court's opinion in *Bose*, carefully reviewed all of petitioners' evidence and correctly found it wanting.

STATEMENT OF THE CASE

Petitioners' statement of the case omits pertinent evidence and misstates much of the evidence that it does discuss. The evidence is reviewed in detail in the opinion of the California Supreme Court (Appx., pp. A10-A23, A28-A39),² and we therefore limit our discussion to some of the more important facts:

The parties: Respondents are the publishers and authors of three articles that appeared in *The San Francisco Examiner* in 1976. Those articles described the 1972 trial and conviction of Richard Lee in a San Francisco Chinatown murder case. They reported that a key prosecution witness in that trial—Lee's former cellmate, Thomas Porter—averred in an affidavit that petitioners had induced him to testify falsely that Lee had confessed the murder to him. Petitioners McCoy and Erdelatz were the police officers involved in the case, and petitioner Merle was the assistant district attorney who prosecuted it.

The investigation: Respondent Lowell Bergman, a freelance investigative journalist, was contacted by William Lee, Richard Lee's brother, who asked Bergman to investigate what William Lee believed to have been an unfair trial (Appx., p. A10; R.T. 2702-2705). Although initially reluctant to do so, Bergman reviewed the trial transcript and noted several apparent irregularities in the proceedings (Appx., pp. A10-A11; R.T. 2705-2711). Bergman also met with individuals who provided him with additional information which led him to believe that Richard Lee's

² Petitioners do not and cannot contend that the California court's review of the evidence is inaccurate or incomplete.

trial may have been unfair (Appx., pp. A11-A13; R.T. 2713-2717, 2719-2726). Thereafter, Bergman wrote to Lee's former cellmate, Thomas Porter, and asked for an opportunity to interview him (Appx., p. A13; R.T. 2726-2728). Porter, who was then incarcerated in a federal institution in Indiana, responded by telephone call (Appx., p. A13; R.T. 1025-1027, 2728-2729).

Petitioners base their claim of actual malice on the assertion that Bergman solicited from Porter a false recantation of his Lee trial testimony (see Pet., pp. 4, 11). Porter, however, admitted that he *volunteered*, both during his telephone conversation with Bergman and at their subsequent meeting, that he had testified falsely against Richard Lee, that his testimony was induced by threats and promises made by petitioners, and that he was sorry for what he had done (Appx., pp. A13-A14, A15-A16, A28-A29; R.T. 1026-1027, 1028-1030, 1037, 1161, 1242-1243, 1284-1285).³

In addition to admitting that he told Bergman that he had lied at the Lee trial, Porter at one point stated that he told Bergman that his Lee trial testimony was true. Porter further testified that Bergman responded that "he didn't believe it" (R.T. 1378); Porter also testified that Bergman made no such statement at all (R.T. 1197). Contrary to petitioners' assertions (Pet., p. 4), *Porter never testified that Bergman asked him to change his Lee trial testimony* (Appx., p. A15).⁴ Rather, because Porter wanted assistance with a perceived sentencing problem in California, he decided to "run a scam" and to tell Bergman what Porter believed

³ Porter was unavailable at the time at trial, and all his testimony was by deposition.

⁴ There is no basis for petitioners' assertion that Bergman "prodded" Porter into giving "an affidavit that would 'help spring Richard Lee'" (Pet., p. 4). The language quoted by petitioners is *Porter's* own characterization of his affidavit (see R.T. 1378). Porter did not claim that Bergman used such language or that Bergman "prodded" the information which Porter willingly volunteered (see R.T. 1197, 1201-1202, 1203, 1242-1243).

Bergman "wanted" to hear (Appx., pp. A15, A29-A30; R.T. 1225, 1235-1236, 1238, 1239-1240, 1281).⁵

After Bergman's interview with Porter, William Lee arranged for an Indiana attorney to obtain an affidavit from Porter in which Porter detailed his claims (Appx., pp. A16-A17; R.T. 1420-1421, 1490, 1508-1509). Thereafter, William Lee and Bergman met with representatives of The San Francisco Examiner, who agreed to investigate the matter (Appx., p. A18; R.T. 2809-2811). Bergman and reporter Raul Ramirez conducted a one and one-half year investigation, interviewing some forty individuals, including attorneys, law enforcement officials, persons involved in Asian-American community affairs, and friends and associates of Richard Lee (Appx., pp. A18, A22, A36). During the course of the investigation, respondents uncovered evidence which, they believed, corroborated Porter's allegations of improper conduct by petitioners.

That evidence included the facts that: (1) petitioner Merle failed to reveal Porter's identity as a prosecution witness prior to trial, in spite of a pretrial discovery order requiring that the names and statements of all witnesses be revealed (Appx., pp. A18-A19; R.T. 2218-2220, 3716); (2) before sentencing, petitioners McCoy and Erdelatz questioned Richard Lee without notifying his attorney (Appx., p. A19; R.T. 2371-2372); (3) records showed that an arrangement had been made between petitioners and Porter after he testified at the Lee trial (Appx., pp. A19-A20; R.T. 2798-2800; and see p. 4, fn. 5); (4) charges of improper conduct had been made against petitioner Merle in other cases (Appx., p. A20; R.T. 2083-2084, 2164, 2275-2276, 2719-2720); (5) Porter advised Bergman that he had overheard Merle applying pressure to

⁵ Porter was under a "detainer" requiring him to return to California to serve additional time after completion of his federal sentence (Appx., p. A13). Porter told Bergman that there had been an agreement with petitioners McCoy and Erdelatz that he would not have to return to California (Appx., p. A13; R.T. 972). Bergman inquired about the detainer and discovered that, in fact, there was a recommendation in Porter's file to that effect (Appx., pp. A13, A19-A20; R.T. 2799-2800; Def.Exh. E-1). The California authorities later released the detainer (Appx., p. A18; R.T. 1303-1304).

obtain testimony in another case, and respondents found a letter from Merle substantiating that claim (Appx., pp. A20-A21; R.T. 1667, 2579-2581, 2729-2730, 3670-3673); and (6) petitioners had pressured the sole eyewitness at Richard Lee's trial to testify in spite of her expressions of substantial uncertainty about her identification of Lee (Appx., p. A21; R.T. 1801-1802, 1921-1922, 2161-2162, 2253-2254).⁶

After completing their investigation, respondents published the articles in question. Shortly thereafter, a petition for habeas corpus was filed on behalf of Richard Lee, supported by Porter's affidavit and declarations from the two eyewitnesses to the killing (Appx., pp. A2, A34; R.T. 4049; C.T. 104-115). In response, the California Attorney General's office interviewed Porter, who then signed a second affidavit, this time averring that his Lee trial testimony in fact was true and that his first affidavit was false (Appx., p. A2; R.T. 997-998, 1290, 3754-3755, 3795). He explained that he had signed the first affidavit because he was angry about the then-unresolved sentencing problem (Appx., p. A2; R.T. 998).

The opinion below: Contrary to petitioners' assertions, the California Supreme Court did not hold that "respondents could have believed the allegations in Porter's affidavit because the other evidence against Richard Lee was weak" (Pet., p. 8). Rather, the California court undertook a careful review of the entire record in order to determine whether petitioners had

⁶ Porter told Bergman that he had already related his story to three other individuals; respondents were unsuccessful in their efforts to locate those individuals (Appx., p. A22; R.T. 1678-1679, 2147). Because of the inaccuracy of jail records, respondents were also unable to confirm the number of meetings that Porter had with petitioners (Appx., pp. A21, A35; R.T. 1702-1703, 2151). Neither fact impeached Porter's claims (Appx., pp. A21, A35; R.T. 1703).

Petitioners erroneously assert that the jail records established "only" three such meetings and that a Lieutenant Huegle testified that the records were accurate (Pet., p. 7). In fact, it is undisputed that the Undersheriff, Jim Denman, testified that he had advised Ramirez that the records were "relatively poor" and that therefore Ramirez might not be able to find the information that he sought (R.T. 4392-4394).

established, by clear and convincing evidence, that respondents had knowledge of falsity or a high degree of awareness of probable falsity.

The court noted that, as petitioners acknowledge here (Pet., p. 11), petitioners' primary claim was that Bergman solicited a false story from Porter (Appx., pp. A27-A30). However, the sole support for that contention was Porter's ambiguous, uncertain and self-contradictory deposition testimony. The California court held that such testimony was not clear and convincing proof that Bergman solicited a lie, and that therefore it could not support an inference of constitutional actual malice (Appx., p. A29). The court also held that petitioners' claims of actual malice based on other evidence were equally flawed (Appx., pp. A31-A39).⁷

ARGUMENT

I

THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN ACCORD WITH THIS COURT'S DECISIONS, AND NO CONFLICT IS PRESENTED WITH THE DECISION OF ANY OTHER COURT.

A. The California court correctly held that an inference of constitutional actual malice could not be drawn from the ambiguous deposition testimony of a single witness.

Petitioners' case hinges on their claim that "a false affidavit [was] solicited by one of the reporters—Bergman" (Pet., p. 11). Petitioners, however, fail to set forth the critical evidence on this point—all of which is found in the deposition testimony of Porter. In that testimony, Porter acknowledged that he *volunteered* to Bergman that his testimony at the Lee trial was false and that it was induced by petitioners (Appx., pp. A13-A14, A16, A28-A29; R.T. 1026-1027, 1028-1030, 1037, 1242-1243, 1284-1285). It is

⁷ Petitioners note, but do not argue, their claim with respect to respondents' reports of certain California State Bar proceedings relating to petitioner Merle (see Pet., pp. 3, 7). The California Supreme Court thoroughly analyzed, and correctly rejected, that claim (see Appx., pp. A23, A38-A39).

undisputed that Bergman never asked Porter to manufacture his claims and that Porter did not tell Bergman or anyone else (prior to publication of the articles here in issue) that the events recited in his affidavit were not true (R.T. 1161, 1201-1202, 1203).

Petitioners' *only* evidence of "solicitation" by Bergman was Porter's account that he told Bergman that his Lee trial testimony actually was true. At one point, Porter stated that Bergman had responded that "he didn't believe it" (R.T. 1378), but at another point Porter denied that Bergman had made any such statement at all (R.T. 1197). The California court carefully analyzed this evidence:

"It is unclear from Porter's deposition testimony whether [Bergman's alleged] response—the lynchpin of respondents' argument—merely reflected Bergman's confusion over the discrepancy between Porter's posture on the telephone and his new position (i.e., he thought Porter had told him that the testimony was false); or reflected Bergman's statement of his own belief that Porter had lied.

"In either case, respondents err in relying on this isolated piece of ambiguous evidence as sufficiently *clear and convincing* proof that Bergman knowingly solicited the intricate lie that Porter proceeded to tell and tell again. As the Supreme Court stated in *Bose Corp. v. Consumers Union of U.S., Inc.*, supra, "[a]nalysis of this kind may be adequate when the alleged libel purports to be an . . . account of events that speak for themselves," but is not appropriate where the event in issue "bristle[s] with ambiguities" (Appx., p. A29) (emphasis by court).

The California court went on to note that Porter's testimony showed that he confirmed to Bergman, over and over again, that he had lied at the Lee trial and that Porter believed that "he had managed to 'run a scam' on * * * Bergman" (Appx., pp. A29-A30); this evidence is "a far cry from clear and convincing proof that [Bergman had requested] that Porter lie" (Appx., p. A30) (emphasis by court).

The California court's conclusion was manifestly correct. On two occasions, this Court has emphasized that, while a jury's

inference of actual malice may be permissible when drawn from a " 'direct account of events that speak for themselves,' " such an inference may not be drawn from "an event 'that bristled with ambiguities' " (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 512-513, quoting *Time, Inc. v. Pape* (1971) 401 U.S. 279, 285, 290) (emphasis by Court). The California court properly applied the rule set forth in *Pape* and *Bose* to limit the inferences to be drawn from Porter's vague, ambiguous and self-contradictory deposition testimony. Contrary to petitioners' assertions (Pet., pp. i, 14), the California court did not suggest, let alone hold, that a jury's resolution of purely factual questions, i.e., "events that speak for themselves," should be disregarded by an appellate court. Nor did the court suggest that questions of credibility pertaining to actual malice determinations should be reweighed by an appellate court.

Hence, no conflict exists with the post-*Bose* decisions cited by petitioners (Pet., pp. 11, 13). Those decisions involved jury resolutions of factual conflicts concerning events that spoke for themselves. For example, in *Tosti v. Ayik* (Mass. 1985) 476 N.E.2d 928, there was a direct conflict in eyewitness testimony as to whether the plaintiff was present on certain occasions and whether he performed certain acts (476 N.E.2d 936). And in another decision cited by petitioners, the court noted that "the versions of *what occurred* are in direct conflict" (*Starkins v. Bateman* (Ariz.App. 1986) 724 P.2d 1206, 1211) (emphasis added).⁸ There was no such direct conflict in the evidence in this case. Rather, the *only* evidence of alleged solicitation of a "lie" was the ambiguous and uncertain deposition testimony of a single witness. The California court correctly applied this Court's rulings

⁸ A similar direct factual conflict was involved in *Dombey v. Phoenix Newspapers, Inc.* (Ariz. 1986) 724 P.2d 562, 574-576 (conflict as to whether the defendants were aware that their report was false). The remaining case cited by petitioners on this point, *Gazette, Inc. v. Harris* (Va. 1985) 325 S.E.2d 713, contains only dictum (see 325 S.E.2d 727-728).

to that testimony, and no conflict with any other decision is present.⁹

B. Petitioners' remaining evidence does not support a finding of actual malice.

Petitioners' remaining evidence also falls short of clear and convincing evidence of actual malice. For example, petitioners rely on Bergman's trial testimony that "he believed that the articles did not hurt [petitioners]," contending that the jury could have concluded that such "extraordinary" testimony undermined his credibility (Pet., p. 12). However, as this Court has pointed out, even if the trier of fact rejects testimony about events which occurred *after* publication, such discredited testimony "does not establish that [the writer] realized the inaccuracy at the time of publication"; it therefore "does not constitute clear and convincing evidence of actual malice" (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 512; accord: *Anderson v. Liberty Lobby, Inc.* (1986) ____ U.S. ____, 106 S.Ct. 2505, 2514).¹⁰ In a similar vein, petitioners note that Porter sent a Christmas "greeting" to petitioners, "the tone of which belied any prospect that the petitioners had forced him to commit perjury"

⁹ The pre-*Bose* decisions in *Alioto v. Cowles Communications, Inc.* (9 Cir. 1975) 519 F.2d 777 and *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael* (9 Cir. 1974) 492 F.2d 438 (Pet., p. 10) discuss only general rules of appellate review under the *New York Times* rule. Neither analyzed the inferences that may be drawn from ambiguous evidence to support a finding of actual malice—the issue involved in *Pape*, *Bose* and the instant case.

¹⁰ Petitioners also point to letters written by Bergman to Porter (Pet., p. 12). In the second letter, Bergman made clear that "I'm trying to set the record straight and that is my motivation" (Appx., p. A17; Pl.Exh. 28). No inference of actual malice can be drawn from these letters.

(Pet., p. 3). Petitioners again ignore a critical fact: there is no evidence that respondents were aware of this "greeting".¹¹

Petitioners also make much of a supposed failure to corroborate Porter's charges (see Pet., pp. 6-7, 12). Petitioners insinuate that there must be "corroboration" by testimony of a participant in, or a witness to, the events in question. Because petitioners and Porter were the *only* witnesses to the events between themselves and because petitioners declined to speak to the reporters, it was impossible to obtain such direct corroborative evidence here:

"Where a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth" (*Hotchner v. Castillo-Puche* (2 Cir. 1977) 551 F.2d 910, 914).

Moreover, petitioners ignore the substantial corroboration that was discovered by respondents. For example, the sole eyewitness at the Lee trial was uncertain in her testimony, and she advised respondent Ramirez that she was "never sure" about her identification of Richard Lee (Appx., p. A21; R.T. 1801-1802, 2161). She told respondents, and others who related her information to respondents, that petitioners had become angry with her when she expressed her uncertainty and that they had assured her there were several other eyewitnesses who had seen Richard Lee commit the crime (Appx., p. A21; R.T. 1801-1802, 1918-1933, 2158-2162, 2253-2254). Hence, respondents had direct evidence that petitioners had applied pressure to a key witness to assure her testimony against Lee. Petitioners do not, and cannot, deny this. Other evidence corroborating Porter's general allegations of im-

¹¹ The purpose of Porter's communication (not mentioned by petitioners) was to solicit their favorable comment at an upcoming parole board hearing (R.T. 3181-3182).

proper conduct is discussed above (pp. 4-5), and in the opinion below (see Appx., pp. A18-A21).¹²

II

THE CALIFORNIA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S OPINION IN *AN- DERSON v. LIBERTY LOBBY*.

Petitioners' assertion (Pet., pp. 13-14) that a conflict exists between the decision of the California court and the decision in *Anderson v. Liberty Lobby, Inc.* (1986) ____ U.S. ____, 106 S.Ct. 2505 is based upon the same misconceptions discussed above. The California Supreme Court said nothing about reweighing the evidence or disregarding a fact-finder's resolution of purely factual questions. Rather, that court simply applied *Bose* and other pertinent cases to inferences drawn from ambiguous deposition testimony and to post-publication events that could not shed any light on respondents' knowledge at the time of publication. The California court did so correctly; no error occurred, and no issue is presented for review.

¹² Petitioners do not even attempt to address the California court's review of the evidence or the court's conclusion, based on its evidentiary review, that the jury could not reasonably have determined that actual malice existed. Instead, petitioners seize upon a single sentence in the lengthy opinion below (see Pet., pp. 8-9, 11) to the effect that a court "is not bound to consider the evidence of actual malice in the light most favorable to [plaintiffs] or to draw all permissible inferences in favor of [plaintiffs]" (Appx., p. A9).

This isolated and ambiguous dictum appears only in the California court's preliminary discussion of general principles, and the court did not even mention, let alone apply, the point in its review of the evidence (see Appx., pp. A28-A39). When it analyzed the evidence, the California court did not disregard the jury's resolution of purely factual questions, nor did it draw any inferences of its own; rather, it simply rejected a constitutionally impermissible inference (*supra*, pp. 6-8) and held that a credibility determination about an event after publication was irrelevant (*supra*, p. 9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: San Francisco, California, April 13, 1987.

Respectfully submitted,

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Both briefs in opposition apparently recognize that the issue raised by petitioners is indeed worthy of the Court's attention (Hearst Corp. Br. at 2; Ramirez-Bergman Br. at 22-23). This recognition is especially appropriate given the D.C. Circuit's recent *en banc* decision in *Tavoulareas v. Piro*, No. 83-1604 (C.A.D.C. March 13, 1987), where that court resolved in the affirmative the question whether, under *Bose*, an appellate court must view the evidence in the light most favorable to the plaintiff.

Respondents argue, however, that this case does not appropriately present the issue for two reasons. First, despite the California Supreme Court's clear insistence that it was "not bound to consider the evidence of actual malice in the light most favorable to [petitioners] or to draw all permissible inferences in favor of [petitioners]," (Pet., App.A at A-9), respondents contend that "the California court did not disregard the jury's resolution of purely factual questions, nor did it draw any inferences of its own." (Hearst Br. at 11 n.12; see Ramirez-Bergman Br. at 10).

Second, and somewhat inconsistently, respondents argue that if the California Supreme Court did reject jury findings, make its own credibility determinations and draw its own inferences from the evidence, it was justified in doing so because "petitioners' principal evidence, the testimony of Thomas Porter, was offered only in the form of deposition and affidavits." (Ramirez-Bergman Br. at 8; see Hearst Br. at 7-9).

With respect to respondents' first objection, the most obvious refutation is that when, after full briefing on the issue, the Court of Appeals below conducted its *Bose* review viewing the evidence in the light most favorable to the petitioners, it found that the case presented a "textbook case of libel." (Pet., App.B at B-38). Indeed, the California Supreme Court's holding that it was "not bound to consider the evidence of actual malice in the light most favorable to [petitioners] or to draw all permissible inferences in favor of [petitioners]," was a direct response to the mode of *Bose* review employed by the Court of Appeals, which expressly drew all inferences in petitioners' favor and resolved all questions of credibility on their behalf. (Pet., App.B at B-5). Beyond this, however, and without purporting to be exhaustive, there are a number of instances in which the California Supreme Court clearly did not view evidence favorable to the petitioners in a favorable light. For example:

- (1) John Manning, the Indiana attorney enlisted by Bergman to obtain Porter's affidavit, conveyed his serious doubts about the veracity of the affidavit to Bergman. The Court of Appeals rightly viewed this as powerful evidence of actual malice. (Pet., App.B at B-13-14). The California Supreme Court, however, took a quite contrary view of the significance of Manning's warnings. It accepted, at face value, Bergman's testimony that he viewed Manning's comments as going only to "the lack of weight the testimony of Porter, a convict, would have in a legal proceeding." (Pet., App.A at A-16-17; 36). Thus, in direct opposition to the standard employed by the Courts of Appeal for the District of Columbia and Ninth Circuits and several state Supreme Courts, the California Supreme Court viewed this evidence most favorably to the *defen-*

dant-respondents rather to the petitioners. Moreover, in doing so, the court necessarily credited Bergman, a witness the jury could rightly have found to lack credibility. See Pet. at 12.

- (2) During their only face to face meeting, Porter told Bergman that he had not been threatened by the police. Porter's allegations that he was beaten by officers McCoy and Erdelatz were made *for the first time* in the affidavit secured by Manning. Although Manning conveyed his doubts about the affidavit to Bergman, and Bergman and Ramirez admitted they had doubts about the truthfulness of at least some portions of the affidavit, these allegations were published wholesale without a single thread of corroboration. (Pet., App.A at A-65-66). The Court of Appeals rightly viewed this as substantial evidence of actual malice. (Pet., App.B at B-15-16). The California Supreme Court simply ignored this evidence.
- (3) Ramirez and his city editor, William Burkhardt, knew that Erdelatz and McCoy were considered good police officers. They had even been told this by Richard Lee's attorney. Despite this, and despite their awareness that the articles would seriously damage the officers' reputations, respondents published the uncorroborated allegations in Porter's affidavit. Again, the Court of Appeals rightly viewed this as meaningful evidence of actual malice. (Pet., App.B at B-14). Again the California Supreme Court ignored this evidence.

With respect to respondents' second objection, it is clear that the California Supreme Court did far more than simply put its own gloss on Porter's affidavit testimony. None of the items discussed above involve the interpretation of Porter's testimony. Moreover, respondents do not explain why the fact that *Porter's* testimony was in affidavit form should allow the California Supreme Court to draw its own conclusions about *Bergman's* credibility. The California Supreme Court fully credited Bergman's testimony concerning the significance of Manning's warning concerning the defamatory allegations in Porter's affidavit. It also credited Bergman's testimony that his promise to Porter that he was "going to

bat in a full scale way" for Porter did not mean helping Porter with his detainer. (Pet., App.A at A-18). The jury, however, viewing Bergman in the flesh, was fully entitled to reject these assertions.¹

In short, this case presents a timely and well-tailored vehicle for deciding the question presented. As Chief Judge Wald observed in *Tavoulareas v. Piro, supra*, when it comes to the question "of what is a proper application of *Bose* to the record . . . we badly need to clarify the appropriate role of a reviewing court in this volatile area of the law . . ." ____ F.2d ____, ____, No. 83-1604 (D.C.Cir. March 13, 1987) (en banc) (Wald, C.J., concurring), Slip. Op. at 5.

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Respectfully Submitted,

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¹ Respondents have made much of the "testimony" of "eyewitnesses" May Tom and Weyman Tso. These "eyewitnesses" never testified at trial. Their "testimony" was presented purely in hearsay form. It was not presented for the truth, but only as bearing on respondents' state of mind.

